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Refreshing Contractual Analysis of ADR Agreements By Curing Bipolar Avoidance of Modern Common Law

Amy J. Schmitz†

Vicky enjoys her job, but is ready to quit. Vicky can no longer endure her boss's sexually explicit remarks, but she is frightened to confront him and is uncertain whether her contract permits her to sue him for sexual harassment. Her employment contract provides that "any and all disputes arising out of or related to employment at this company must be submitted to an informal dispute resolution process, in which all parties shall seek to resolve the disputes in an amicable manner." Does Vicky's contract require arbitration or some other type of dispute resolution process? If the process is not arbitration, then must Vicky still pursue the process before filing a harassment suit in court?

It seems obvious that Vicky's contract contains an agreement to participate in a non-binding alternative dispute resolution ("ADR") process, instead of binding arbitration.¹ However, it is uncertain how a court would analyze or enforce the agreement. Many courts approach these agreements in a bipolar manner: they either treat the process as "arbitration" under arbitration statutes to summarily compel participation in the process or assume any process not governed by statute is unenforceable under antiquated and narrow common

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1. "ADR," or Alternative Dispute Resolution, generally refers to any non-litigation dispute resolution process, which theoretically would include court-annexed programs and binding arbitration under the Federal Arbitration Act ("FAA") and Uniform Arbitration Act ("UAA"). However, the ADR term is riddled with ambiguities. See, e.g., Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument That the Term "ADR" Has Begun to Outlive Its Usefulness*, 2000 J. DISP. RESOL. 97 (discussing confusion among various forms of non-judicial dispute resolution and possible implications). This Article uses the term to refer to non-judicial dispute resolution processes outside the FAA and UAA.

law.² This bipolar “all-or-nothing” approach perpetuates misapplication of statutory remedies and procedures at one extreme, while discounting parties’ contract promises and process values of ADR at the other extreme. Such an approach ignores legislative prescriptions, as well as modern contract and remedy tools. This Article proposes that courts cure this bipolar avoidance of modern common law in two steps: (1) eliminate antiquated doctrines and narrow assumptions about private dispute resolution; and (2) refresh contractual analysis of non-statutory ADR agreements. This refreshed analysis should promote cooperative relations while protecting parties from perils of coerced ADR.

Agreements to participate in non-binding ADR processes, which this Article will refer to as “ADR agreements,”³ are becoming increasingly important as parties tailor ADR provisions to their transactions.⁴ ADR agreements are outside the purview of the primary arbitration statutes, the Federal Arbitration Act (“FAA”)⁵ and the Uniform Arbitration Act (“UAA”).⁶ These acts govern only written agreements to resolve disputes through *binding* arbitration.⁷ Nevertheless, courts misapply the acts to ADR agreements and automatically order parties to participate in ADR without balancing equitable

2. See Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 Wis. L. REV. 831, 831-35 (warning against application of arbitration laws to dispute resolution “willy-nilly without discussion”).

3. I use the term “ADR agreements” in this Article to concisely refer to executory, or unperformed, contracts requiring parties to submit disputes to non-judicial dispute resolution processes not governed by the FAA and UAA. This includes oral arbitration agreements and agreements calling for negotiation, mediation, mini-trial, non-binding arbitration, evaluative processes, and other ADR processes outside the purview of the acts. The related debate regarding what processes are sufficiently final to be governed by the FAA is beyond the scope of this Article. See Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration’s Finality Through Functional Analysis*, 37 GA. L. REV. 123, 124-32 (2002) (discussing the meaning of finality under the FAA).

4. See Robert A. Baruch Bush, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What it Means for the ADR Field*, 3 PEPP. DISP. RESOL. L.J. 111 (2002) (emphasizing expansion of mediation due, in part, to growing criticism regarding fairness and judicialization of binding arbitration under the FAA, and challenging mediation proponents to protect mediation as “a product that succeeds, or fails, on its own”).

5. 9 U.S.C. § 1 et seq. (2002).

6. UNIF. ARBITRATION ACT (“UAA”), 7 U.L.A. § 1 et seq. (1997). Discussion of FAA remedies generally implicates application of the UAA because the UAA is FAA’s state law twin, and it has been adopted or is substantially similar to the law in fifty jurisdictions. See *infra* pp. 10-12 (discussing the UAA).

7. See *Dluhos v. Strasberg*, 321 F.3d 365, 366-68 (3d Cir. 2003) (holding private resolution procedure under the Internet Corporation for Assigned Names and Numbers (“ICANN”) Uniform Domain Name Dispute Resolution Policy (“UDRP”) is not arbitration governed by the FAA because the procedure does not provide a binding

factors to determine whether it is appropriate to order specific performance of an agreement. This means courts may apply the acts' mandatory enforcement scheme even in cases like Vicky's, where compelling a claimant to informally discuss harassment claims with an alleged harasser may emotionally harm the claimant.⁸ Furthermore, the acts' presumptive enforcement schemes were crafted for binding arbitration agreements through which parties waive their rights to litigate, whereas parties to non-binding ADR processes preserve their rights to have claims resolved in court.⁹ Indeed, policy-makers recently declined to extend the UAA to mandate summary enforcement of promises to participate in mediation.¹⁰

That is not to say courts should never order parties' compliance with ADR agreements. Courts should specifically enforce ADR agreements where enforcement will properly hold parties to their contract promises, further cooperative discussions, and perhaps promote beneficial settlement.¹¹ For example, it may be appropriate for a court to compel parties in a highly interdependent or relational transaction to comply with their agreement to mediate disputes arising out of that transaction.

It is not appropriate for a court to assume all ADR agreements are unenforceable under antiquated "ouster" and "revocability" doctrines that traditionally precluded specific enforcement of pre-dispute

third party determination and "unlike methods of dispute resolution covered by the FAA, UDRP proceedings were never intended to replace formal litigation").

8. See *infra* pp. 53-55 (discussing courts' discretion in ordering equitable relief under common law). But see Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT'L ARB. 225, 243-44 (1997) (proposing that "the applicability of the FAA seems to be a question of largely theoretical interest given the undoubted power of a court to enforce such agreements as a matter of ordinary contract law"); ALAN SCOTT RAU, ARBITRATION 156, n.73 (proposing the same, while acknowledging practical significance of the FAA's application with respect to procedural provisions).

9. See *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 270 (1995) (emphasizing pro-enforcement purpose of the FAA); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) ("The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate.").

10. See UNIF. MEDIATION ACT § 5(i) (Annual Meeting Draft, Jul. 23-30, 1999) (noting that the National Council of Commissioners on State Laws ("NCCUSL") recently considered and rejected the expansion of the UAA to mandate specific enforcement of agreements to mediate). In addition, drafters of UMA did not prescribe enforcement legislation regarding enforcement of agreements to mediate because they assumed that common contract law provides for enforcement analysis. See also THE UNIFORM MEDIATION ACT, reprinted in 22 N. ILL. U. L. REV. 165, 166-72 (2002) (providing final draft without summary enforcement provisions).

11. See *infra* pp. 63-64 (discussing enforcement of ADR agreements where participation in the process may not necessarily result in settlement, but at least will promote cooperative behavior or provide other collateral benefits).

agreements to arbitrate.¹² Ouster theory proposed that parties cannot “oust” courts’ power to resolve legal claims, and revocability condoned a party’s unilateral revocation of an arbitration agreement.¹³ These doctrines have no solid basis.¹⁴ Nonetheless, some courts continue to apply them, perhaps due to judicial skepticism of private processes or resentment of the Supreme Court’s seemingly pro-arbitration agenda.¹⁵ Some courts also mask these doctrines in presumptions against ordering participation in ADR under rigid classical contract principles and traditional limitations on coercive remedies.

This has left contracting parties lost in a landscape of “fundamentally aimless, meandering, and above all, confusing” judicial decisions governing enforcement of ADR agreements.¹⁶ The time is ripe to clarify the law applicable to these agreements and to spark modern contractual enforcement of these non-FAA/UAA procedures.¹⁷ To the extent it may be appropriate for policymakers to legislate enforcement rules and standards, they cannot complete that task without clarification of current law. Modern contract law remedies already

12. See *infra* Part III (discussing and criticizing ouster and revocability doctrines).

13. See *infra* pp. 21-42 (discussing doctrines and their development).

14. See *infra* pp. 26-29, 38-46 (discussing legal developments denouncing ouster and revocability doctrines).

15. It seems that over-application of the FAA to all dispute resolution agreements, regardless of whether an agreement requires binding arbitration governed by the Act, inappropriately federalizes a vast area of contract law. See IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 175-78 (1992) (noting nationalization of commercial arbitration law through the FAA’s preemptive interpretation and application); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding the FAA preempts state law in both federal and state court).

16. MACNEIL, *supra* note 15, at 172 (observing further that the arbitration story “illustrates the cover-up function of formalism,” and reveals the inevitable conclusion that “a major force driving the Court is docket-clearing pure and simple”). See also John H. Wilkinson, *Alternative Dispute Resolution: What the Business Lawyer Needs to Know* 1999, in DONOVAN LEISURE NEWTON & IRVINE *ADR PRACTICE BOOK* § 15.33, at 987-88 (1999) (advising attorneys that in light of courts’ unclear enforcement of agreements to participate in non-binding procedures, “as a practical matter, it would seldom, if ever, make sense to sue for breach of an ADR clause”).

17. This Article seeks to spark and inform discussion regarding proper enforcement of ADR agreements, by offering an “interpretive analysis” of the applicable law. See Richard Craswell, *In that Case, What Is the Question? Economics and the Demands of Contract Theory*, 112 *YALE L.J.* 903, 917-19 (2003) (borrowing the term “interpretive analysis” from Melvin A. Eisenberg, *The Theory of Contracts*, in *THE THEORY OF CONTRACT LAW* 206, 213-22 (Peter Benson ed., 2001)). In other words, the Article seeks to clarify and reconstruct concepts applicable to ADR agreements in terms familiar to judges, lawyers and others in the legal academy so that we can engage in a coherent normative discussion of how these concepts should be applied in given cases.

provide courts with tools for developing an equitable enforcement approach.¹⁸ Contract law also is more adaptive than the FAA/UAA summary enforcement scheme. It allows courts to consider contextual, relational, and equitable factors when determining application of specific enforcement remedies.¹⁹ This allows courts to use these tools not only to foster contract compliance and cooperative relations, but also to protect individuals from coerced participation in ADR that will cause undue financial or emotional hardship, or otherwise defeat the very purposes of ADR.²⁰

Accordingly, Part I of this Article discusses how courts' misapplication of the FAA and UAA to ADR agreements has hindered development of applicable contract law remedies. Part II explores how survival of ouster and revocability principles has further confused proper enforcement of ADR agreements by haunting judicial analysis of arbitration and contributing to some courts' narrow perceptions of other dispute resolution processes. Part III then calls for courts to "oust" the ouster and revocability doctrines because they are based on flawed notions of jurisdictional and agency principles. It argues that courts should refresh contractual analysis and specific enforcement of ADR agreements in light of common law's evolved respect for differing bargaining contexts and for virtues of ordering specific relief. This Article contends courts should finally cleanse the law of faulty anti-enforcement doctrines and antiquated remedy limitations in order to develop a process-oriented approach for enforcing ADR agreements. Building on modern common law principles, Part IV proposes contract and remedy tools for implementing this refreshed common law approach.

I. MISAPPLICATION OF THE FAA AND UAA TO ADR AGREEMENTS

Binding arbitration under the FAA and UAA is separate and distinct from evaluative and facilitative ADR processes. It is governed

18. See Mark Boyko, *State Legislatures See Flood of ADR Bills in First Quarter of 2003*, DISP. RESOL. MAG., Spring 2003, at 29 (noting fragmented and varying ADR statutes).

19. Professor Katz aptly proposed that parties to ADR agreements should be able to rely on contract remedies, namely specific performance, as means for obtaining the benefit of their bargains. Lucy V. Katz, *Enforcing an ADR Clause — Are Good Intentions All You Have?*, 26 AM. BUS. L.J. 575, 576-77 (1988) (suggesting further that a "process oriented" definition of ADR should be adopted, and that courts applying this definition may then "order specific performance or award substantial damages for breach, including punitive damages for bad faith breach of contract"). This Article extends that discussion.

20. See *infra* Part I.B. (discussing courts' enforcement of contracts calling for non-binding procedures).

by the acts' "integrally related" pro-enforcement schemes that do not merely mimic contract law.²¹ Instead, the FAA and UAA mandate that courts automatically order specific performance of valid agreements to arbitrate, without balancing equities and exercising discretion as a court otherwise must do before ordering coercive remedies under common law.²² In addition, the FAA/UAA scheme prescribes strict enforcement procedures that include streamlined motion practice, liberal venue provisions, immediate appeal from orders adverse to arbitration, arbitral immunity, limited review of awards, and treatment of awards as judgments.²³ Some courts have emphasized that it is appropriate to strictly enforce written agreements requiring binding arbitration because such agreements provide proof of parties' intent to waive litigation.²⁴ ADR agreements do not provide this

21. See *Sedco, Inc. v. Petroleos Mexicanos Mex. Nat'l Oil Co.*, 767 F.2d 1140, 1142-45 (5th Cir. 1985) (emphasizing courts must broadly construe arbitration agreements, and compel arbitration unless opponent rebuts enforcement presumption with strong evidence that dispute is not covered by an agreement); Lisa C. Thompson, *International Dispute Resolution in the United States and Mexico: A Practical Guide to Terms, Arbitration Clauses, and the Enforcement of Judgments and Arbitral Awards*, 24 SYRACUSE J. INT'L L. & COM. 1, 31 (1997) (contrasting extraordinary enforcement schemes applicable to arbitration and contract law remedies applicable to other non-arbitration procedures); Gregory Firestone, *An Analysis of Principled Advocacy in the Development of the Uniform Mediation Act*, 22 N. ILL. U. L. REV. 265, 277 (2002) ("Mediation can be distinguished from binding arbitration in that the parties are the decision-makers and the mediator has no decision-making authority."); *Ohio Council 8 et al. v. Ohio Dept. of Mental Retardation and Developmental Disabilities et al.*, 459 N.E.2d 220, 222-23 (Ohio 1984) (refusing to apply arbitration law to a non-binding dispute resolution procedure, and emphasizing that arbitration and mediation "are not functionally equivalent"). See also *City of Omaha v. Omaha Water Co.*, 218 U.S. 180, 192-99 (1910) (finding that appraisal was not arbitration, and therefore "the strict rules relating to arbitration and awards do not apply"); *Collins v. Collins*, 26 Beav. 306, 313-14 (1858) (finding that Act of Parliament governing enforcement of arbitration did not apply to appraisal, and therefore remedies for breach of an appraisal agreement under common law would apply). See also Wesley A. Sturges & Richard E. Reckson, *Common-Law and Statutory Arbitration: Problems Arising From Their Coexistence*, 46 MINN. L. REV. 819, 820 (1962) (emphasizing that the sections of the FAA "are integrally related and are not a series of independent provisions").

22. See *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 931 (10th Cir. 2001) (emphasizing FAA's special statutory scheme). Under contract law, courts only will exercise discretion to specifically enforce a contract when ordering damages would be inadequate, and coercive relief is appropriate in light of all facts and circumstances, as well as the public interest. RESTATEMENT (SECOND) OF CONTRACTS § 357 cmt. c. (1977). See also U.C.C. § 2-716(1) (1977) (providing that courts may order specific performance of a sale of goods "where the goods are unique or in other proper circumstances").

23. See *infra* Part I.A.1. (discussing the FAA's broad remedial scheme).

24. See *Bowen*, 254 F.3d at 935 (emphasizing that parties to a binding arbitration contract agree to forego judicial recourse, and therefore "trade the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration") (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31

same proof of waiver. Therefore, courts should not misapply the acts to ADR agreements in contravention of legislative principles urging narrow application of statutory remedies and procedures. Furthermore, courts' improper reliance on the FAA and UAA hinders development and application of common law remedies that allow courts to exercise discretion in enforcing ADR agreements.²⁵

A. *Limited Application of FAA/UAA Statutory Remedies and Procedures*

Drafters of the FAA and UAA did not expressly define "arbitration" in the acts.²⁶ They effectively limited the acts to protect binding arbitration, however, by requiring enforcement of a consensual procedure that "settles" disputes through a final and binding third party determination.²⁷ The acts mandate that courts summarily order parties to participate in arbitration, and confirm awards, subject only to

(1991) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

25. See *infra* Part IV (proposing flexible and process-oriented application of common law remedies to enforce ADR agreements).

26. *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1207 (9th Cir. 1998). See also *Karthauss v. Yllas y Ferrer*, 26 U.S. 222 (1828) (wrestling with the meaning of arbitration). The revisors of the UAA also opted not to define "arbitration." See Richard E. Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 Nw. U. L. Rev. 189 (2000).

27. See MACNEIL, *supra* note 15, at 7 (defining arbitration's characteristics to include "a binding award" with the arbitrator's decision "subject to very limited grounds of review, final and enforceable by State law in the same manner as a judgment"). See also 9 U.S.C. § 2 (directing FAA's application to written agreements "to settle by arbitration" disputes arising out of transactions involving interstate commerce); 7 U.L.A. § 1 (prescribing UAA's application to agreements to "submit" disputes to arbitration); Wesley A. Sturges, *Arbitration—What Is It?*, 35 N.Y.U. L. Rev. 1031, 1032 (1960) (emphasizing arbitration's role as a conclusive process); 1 GABRIEL M. WILNER, DOMKE ON COMMERCIAL ARBITRATION § 1.01, at 1 (3d ed. 1989) (citations omitted) (similarly defining arbitration); William H. Knull & Noah D. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?*, 11 AM. REV. INT'L ARB. 531, 531-34 (2000) (acknowledging that "finality" under arbitration law means "the lack of appeal on the merits of the dispute"); Harry Baum & Leon Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N.Y.U. L.Q. 238, 239-40 (1930) (emphasizing arbitration's privacy and independence); Schmitz, *supra* note 3, at 123-32 (emphasizing finality of arbitration under the FAA and UAA).

very limited judicial review.²⁸ Moreover, policy-makers recently reinforced the FAA/UAA models' targeted application to binding arbitration by refusing to extend the UAA to govern enforcement of agreements to mediate.²⁹

1. *FAA's Mandatory Enforcement Scheme Crafted for Written Arbitration Agreements*

Legislators enacted the FAA in 1925 using New York's 1920 Arbitration Law as a model, and conceiving arbitration as a final and independent process.³⁰ Both the federal and New York legislation mandated automatic specific enforcement of executory arbitration agreements and established a remedial scheme for summarily enforcing awards and protecting the process from judicial intrusion.³¹ The legislation was revolutionary because it cast aside discretion and equitable principles courts otherwise apply in determining whether to order specific performance of executory contracts.³² Policy-makers rejected proposals to reinstate common law contract and remedy analysis for these written agreements to arbitrate.³³ Instead, they

28. 9 U.S.C. § 10 (2002); UNIF. ARBITRATION ACT § 23 (amended 2003), 7 U.L.A. 43 (West Supp. 2003) (originally § 12 (1955)).

29. 1 WILNER, *supra* note 27, 1.02 at 4 ("Mediation is an advisory, arbitration a judicial, function. Mediation recommends, arbitration decides.") (Citation omitted). See also MODEL RULES OF PROF'L CONDUCT R. 2.4 cmt. 5 (2002) (recognizing arbitration's finality as a key distinguishing characteristic in differentiating a lawyer's duty of candor in binding arbitration versus other dispute resolution processes); Katz, *supra* note 19, at 589-90 (noting limited review is key to arbitration's "specific meaning" under arbitration statutes).

30. 9 U.S.C. §§ 1-16 (covering domestic arbitration) and §§ 201-08 (implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards); N.Y. Laws 1920, chap. 275. See also Sabra A. Jones, *Historical Development of Commercial Arbitration in the United States*, 12 MINN. L. REV. 240, 247-49 (1927) (discussing FAA history); American Bar Association Committee on Commerce, Trade and Commercial Law, *The United States Arbitration Law and its Application*, 11 A.B.A. J. 153 (1925) (providing legislative history of FAA, originally enacted as the United States Arbitration Law).

31. ABA Committee on Commerce, Trade and Commercial Law, *supra* note 30, at 154-56.

32. See Philip G. Phillips, *The Paradox in Arbitration Law: Compulsion as Applied to a Voluntary Proceeding*, 48 HARV. L. REV. 1258, 1265-67 (1932-33) (emphasizing the law's elimination of discretion and equitable balancing of harm and benefits courts otherwise would apply to determine whether to order specific performance of a contract).

33. As one commentator proposed:

Instead of thrusting a "duty to enforce" all arbitration agreements on the courts, the arbitration statute should grant the power to enforce arbitration clauses in the proper case — but the plaintiff might well have to show an

legislated that a court coercively enforce these agreements by compelling arbitration if “the making of the contract or submission or the failure to comply therewith is not in issue.”³⁴

The FAA directs courts to stay judicial proceedings³⁵ and order arbitration³⁶ with few procedural formalities.³⁷ The Act also provides liberal venue options³⁸ and immediate appeal from orders adverse to arbitration.³⁹ If the parties agree that judgment may be entered on an arbitration award, “the court *must* grant such an order

irreparable loss to him in the event that the contract to arbitrate is not specifically enforced before his petition to compel would be granted; and the defendant should certainly be able to defeat a motion to compel by showing the impracticability or injustice of granting the motion. Of course, we do not propose to revert to the absolute revocability of the old common law.

Id. at 1278.

34. *Id.* at 1265. The FAA makes arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.

35. Once the court is “satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement,” the court must stay judicial proceedings until completion of arbitration. 9 U.S.C. § 3.

36. 9 U.S.C. § 4. If a valid arbitration agreement exists, any issues going to the validity of the underlying contract are for the arbitrators to decide. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) (announcing the “separability doctrine” that deems the arbitration clause separable from the main contract, thereby requiring that a court compel arbitration of underlying issues once it determines there is an arbitration agreement). Furthermore, if the parties do not empanel an arbitrator, the court will do so. 9 U.S.C. § 5.

37. The FAA mandates simple motion procedures to request a stay of judicial proceedings or an order directing parties to proceed to arbitration and rejects technicalities and delay of filing a lawsuit under usual civil procedure rules. 9 U.S.C. § 6 (applications to the court to modify, vacate, or confirm an arbitration award “shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided”); *Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 46 (2d Cir. 1994) (holding section 6 of the FAA does not require compliance with the pleading requirements of Fed. R. Civ. P. 12(b)). *Cf.* Fed. R. Civ. P. 4-10.

38. *See* 9 U.S.C. § 9 (supplementing general venue options); *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 195 (2000) (holding FAA venue provisions are permissive and therefore expand possible sites for federal motions to confirm, vacate, or modify an arbitration award).

39. *See* 9 U.S.C. § 16 (specifying appeal provisions); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 86-87 (2000) (reiterating that section 16 expands traditional immediate appeal provisions). Although not expressly required by the FAA, arbitration law also provides for arbitral immunity. *See Austern v. Chicago Bd. Options Exch., Inc.*, 898 F.2d 882, 886 (2d Cir. 1990), *cert. denied*, 498 U.S. 850 (1990) (holding arbitrators absolutely immune from liability in damages for all acts within the scope of the arbitral process). Arbitrators also have been immune from suit under state common law due to their special role as final judges of law and fact. *See Kabia v. Koch*, 713 N.Y.S.2d 250, 253-56 (N.Y. Civ. Ct. 2000) (holding Judge Koch was an arbitrator entitled to immunity from liability for statements made on People’s Court because his determinations were “final and binding”).

unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of [the Act]."⁴⁰ Under section 10, an arbitration award may be vacated only on very limited grounds aimed at ensuring basic procedural fairness.⁴¹ Courts narrowly apply these grounds for challenging an award in order to protect the independence and finality of arbitration.⁴² If the parties do not agree that judgment may be entered on an award, the FAA does not apply to its enforcement.⁴³

2. *States' Complimentary Prescription for Enforcement of Binding Arbitration*

a) *Uniform Arbitration Act*

While Congress adopted the FAA, the American Bar Association ("ABA") and the Conference of Commissioners on Uniform State Laws (now known as "NCCUSL") negotiated and drafted the first

40. 9 U.S.C. § 9 (emphasis added).

41. The sole means for challenging a binding arbitration award under the FAA is a motion to vacate under section 10, which allows a court to vacate an award:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10 (West 2003). The UAA and RUAA provide essentially the same limited grounds for judicial review of arbitration awards. UNIF. ARBITRATION ACT § 12 (1955); UNIF. ARBITRATION ACT § 23(a)(1-6) (2000).

42. See *First Options of Chicago, Inc. v. Kaplan* 514 U.S. 938, 942 (1995) (emphasizing that an arbitrator's decision will be set aside "only in very unusual circumstances"); *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1253 (7th Cir.), *cert. denied*, 512 U.S. 1205 (1994) (highlighting that "the scope of review of a commercial arbitration award is grudgingly narrow"). The FAA's limited review is further curtailed by strict notice and time limitations for asserting any challenge to an arbitration award. 9 U.S.C. § 12; *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 174-75 (2d Cir. 1984) (holding three month limit for challenging an award is mandatory).

43. Most arbitration agreements expressly, or through incorporation of American Arbitration Association ("AAA") rules or other arbitration rules, require that judgment may be entered on any award. See *P&P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 866-68 (10th Cir. 1999) (finding parties consented to judicial confirmation of their arbitration award by incorporating AAA arbitration rules requiring that parties allow judgment to be entered on any award). The FAA, however, does not apply to an award rendered pursuant to an agreement that does not implicitly or explicitly provide for consent to judgment. See *Oklahoma City Assocs. v. Wal-Mart Stores, Inc.*, 923 F.2d 791, 794 (10th Cir. 1991).

model arbitration law to be recommended to the states for adoption.⁴⁴ The first UAA model law, however, was unsuccessful, largely because it rejected the FAA's progressive enforcement scheme.⁴⁵ Instead, it mandated enforcement of only post-dispute agreements to arbitrate.⁴⁶ NCCUSL therefore withdrew the act from states' consideration in 1934 and ultimately adopted a revised UAA in 1955. This Act has been enacted in 35 states and is substantially the same as the arbitration statutes in 14 other jurisdictions.⁴⁷

The 1955 UAA, like the FAA, requires courts to automatically and specifically enforce valid agreements to submit existing and future disputes to binding arbitration. This means courts must stay litigation and/or compel participation in arbitration.⁴⁸ The UAA also directs arbitrators to decide issues of fact and law, and courts to enter judgment on arbitration awards that parties agree shall be binding.⁴⁹ Courts may review these awards only for fraud, partiality, action beyond the scope of an arbitration agreement, and arbitrator misconduct that has substantially prejudiced the rights of a party.⁵⁰

44. Wesley A. Sturges, *Arbitration Under the New North Carolina Arbitration Statute — The Uniform Arbitration Act*, 6 N.C. L. REV. 363 (1928) [hereinafter *Arbitration Under the UAA*] (explaining and analyzing the first UAA, which was enacted by the North Carolina legislature in 1927, Laws of North Carolina, 1927, ch. 94).

45. *Id.* at 365 (quoting comments of the AAA Committee on Commerce, Trade, and Commercial Law regarding proposed arbitration laws).

46. *Id.* at 369, 407 (noting adoption of "Illinois idea").

47. See UNIF. ARBITRATION ACT, Prefatory Note, (Tentative Draft No. 4, February 19, 1999). The revised UAA was approved by NCCUSL and the ABA in 1955, and superseded the prior, withdrawn model. UNIF. ARBITRATION ACT, 7 U.L.A. 2 (1997). Zhaodong Jiang, *Federal Arbitration Law and State Court Proceedings*, 23 LOY. L.A. L. REV. 473, 475 n.7 (1990) (invoking state arbitration statutes). See also *Record of Passage of Uniform Model Acts, As of September 30, 1994*, in 1994 HANDBOOK OF THE NAT'L COUNCIL OF COMM'S ON UNIF. STATE LAWS AND PROCEEDINGS 1451 (indicating 49 of 53 jurisdictions have adopted the UAA or substantially similar laws).

48. UNIF. ARBITRATION ACT §§ 1-2, 7 U.L.A. 6 (1997).

49. *Id.* §§ 8-11, at 202, 244, 250, 264.

50. The act provides that a court shall vacate an award where:

1. The award was procured by corruption, fraud or other undue means;
2. There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
3. The arbitrators exceeded their powers;
4. The arbitrators refused to postpone the hearings upon sufficient cause being shown therefore or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5, as to prejudice substantially the rights of a party; or
5. There was no arbitration agreement and the issue was not adversely determined in the proceedings under Section 2 and the party did not participate in the arbitration hearing without raising the objection[.]

Id. § 12(a), at 280.

Furthermore, a court's confirmation of an award is enforceable like any court judgment.⁵¹

In 2000, after re-examination of the UAA, NCCUSL completed a Revised UAA ("RUAA") that affirms strict enforcement remedies and procedures for arbitration. The RUAA again mandates summary enforcement of executory agreements to arbitrate and binding awards subject to very limited judicial review. With respect to mediation, however, NCCUSL's Scope and Program Committee rejected a proposal to revise the UAA to provide for summary enforcement of agreements to mediate disputes.⁵² Instead, the Committee distinguished binding arbitration from non-binding ADR and confirmed that the UAA's enforcement scheme should apply only to binding arbitration.⁵³

b) *Uniform Mediation Act*

While drafting the RUAA, NCCUSL also began to study and draft the first Uniform Mediation Act ("UMA").⁵⁴ Like drafters of the RUAA, the UMA drafters refrained from legislating summary enforcement of agreements to mediate.⁵⁵ Instead, drafters of the UMA assumed that courts order parties to participate in mediation in accordance with contract and equity principles, and therefore determine enforcement in light of public interest, transactional facts, and any irreparable harm due to a failure to mediate.⁵⁶ Drafters decided that the UAA summary enforcement scheme was not appropriate for mediation because it directs enforcement through motion procedures and without a jury trial. The drafters believed it might be preferable

51. *Id.* § 14, at 419 (1997).

52. See UNIF. MEDIATION ACT § 5(i) (Annual Meeting Draft, Jul. 23-30, 1999) (reporting RUAA drafters' rejection of a proposal to provide summary enforcement of mediation agreements).

53. See Judge Michael B. Getty, *The Process of Drafting the Uniform Mediation Act*, 22 N. ILL. U. L. REV. 157, 158 (2002) (explaining mediation was treated separately from arbitration and UAA revisions due to great consensus that mediation "shouldn't be part of arbitration, it's a separate freestanding thing"). In 2002 there were reportedly over 2,500 state and federal statutes, rules and regulations affecting mediation in its own right. *Id.* at 161.

54. *Id.*

55. *Id.* See also Firestone, *supra* note 21, at 270 (noting rejection of proposals to require summary enforcement of mediation in the UMA); UNIF. MEDIATION ACT, *Prefatory Note*, reprinted in 22 N. ILL. U. L. REV. 165, 166-72 (2002) (emphasizing the variety of dispute resolution procedures tailored to individual needs pursuant to parties' agreements).

56. See UNIF. MEDIATION ACT § 5(i) (Annual Meeting Draft, Jul. 23-30, 1999) (discussing courts' equitable analysis in determining whether to specifically enforce mediation agreements).

to preserve legal process protections for enforcement of mediation agreements.⁵⁷

In addition, the UMA Reporters commented that they assumed courts would more readily enforce mediation, despite courts' traditional hostility to arbitration.⁵⁸ Reporters warned, however, that some courts may be reluctant to order specific performance of agreements to mediate due to their narrow focus on settlement, "because, unlike arbitration, mediation does not always provide a resolution."⁵⁹ Drafters of the UMA nonetheless concluded that enforcement of agreements to mediate should be left to courts' application of contract law or state legislatures' determinations pursuant to local policy.⁶⁰

In the end, the UMA drafting process produced model legislation focused mainly on confidentiality and fair bargaining rules.⁶¹ Similarly, states such as Minnesota have enacted mediation statutes aimed at protecting confidentiality, fair bargaining, and enforcement of settlement agreements arising out of the mediation.⁶² States have not adopted broad statutes requiring summary enforcement of all agreements to mediate.⁶³ Instead, policy-makers have left proper

57. *Id.*

58. The Reporter indicated an assumption that courts are willing to enforce mediation agreements, and that "there seems to be little concern in the literature about a need for greater or more expedited enforcement." *Id.* The Reporter, however, only cited two non-labor cases enforcing mediation agreements and cases decided under FAA, and not contract law, for the conclusion that it is not clear courts will summarily enforce agreements to mediate. *Id.* (citing *Cecala v. Moore*, 982 F. Supp. 609 (N.D. Ill. 1997), a case in which the court applied Illinois's UAA to summarily enforce an agreement to mediate, and two other cases based on applicability of the FAA to non-binding dispute resolution procedures).

59. See UNIF. MEDIATION ACT § 5(i) (Annual Meeting Draft, Jul. 23-30, 1999).

60. See *id.* See also Firestone, *supra* note 21, at 270 (noting that enforcement is and should be left to courts and state legislatures).

61. See UNIF. MEDIATION ACT §§ 1-16 (2001), reprinted in 22 N. ILL. UNIV. L. REV. 165 (2002) (stating rules for confidentiality, mediator privileges and disclosures, and party representation, but not addressing enforceability of mediation agreements); Elizabeth Strong, *The Uniform Mediation Act, An Opportunity to Enhance Confidentiality in Business Mediation*, 7 ADR CURRENTS 5, 6 (June-Aug. 2002) (discussing confidentiality focus of UMA).

62. MINNESOTA CIVIL MEDIATION ACT, MINN. STAT. § 572.31-40 (1998) (delineating requirements for setting aside, reforming, and enforcing agreements arising out of mediation, but not addressing enforcement of executory mediation agreements). See also Haghghi v. Russian-American Broad., 173 F.3d 1086, 1087-89 (8th Cir. 1999) (declaring that the Minnesota Civil Mediation Act precludes enforcement of a handwritten settlement agreement arising out of mediation).

63. See UNIF. MEDIATION ACT § 5(i) (Annual Meeting Draft, Jul. 23-30, 1999) (reporting that "[p]rovisions to provide summary and immediate enforcement of agreements to mediate (including mediation clauses), in contrast to arbitration clauses, are uncommon," and citing only two statutes calling for such enforcement, both of which apply only to conciliation in international disputes). See also MINN. STAT. § 572.31-

enforcement of ADR agreements to common contract and remedy principles.⁶⁴

B. *Courts' Use of FAA/UAA Remedies to Escape Common Law Analysis of ADR Agreements*

An ADR procedure, regardless of what the parties label it, is not binding arbitration governed by the FAA or UAA if it relies on the parties' separate settlement agreement to end disputes.⁶⁵ In other words, when a process is substantively non-binding, resolution is not achieved through a third party's binding decision — a key component of arbitration under the FAA and UAA. Instead, an ADR neutral may facilitate settlement or provide an evaluation of the parties' cases, but leaves parties free to walk away.⁶⁶ If parties reach a settlement agreement through such an ADR process, then a court must determine enforceability of that agreement under contract law.

.40 (not addressing enforceability of executory arbitration agreements). Fairly exhaustive research of state dispute resolution statutes in 2002 did not reveal any states that had adopted laws broadly requiring that courts summarily and specifically enforce all executory agreements to mediate commercial disputes. (Notes are on file with author).

64. See Robert P. Burns, *The Enforceability of Mediated Agreements: An Essay on Legitimation and Process Integrity*, 2 OHIO ST. J. ON DISP. RESOL. 93, 94-95 (1986) (noting that unlike confidentiality, enforceability of mediation is not amenable to universal legislation because the contexts vary widely and must be separately analyzed under contract and procedure law).

65. Evaluative mediation is non-binding dispute resolution in which "a neutral expresses an opinion as to the likely outcome or value of a legal claim or defense were it to be adjudicated." Dwight Golann & Marjorie Corman Aaron, *Using Evaluations in Mediation*, 52 DISP. RESOL. J. 26, 28-30 (1997) (noting evaluative mediation's similarities to other non-binding procedures that go further than facilitating negotiation to providing a solution, and emphasizing that such mediation may satisfy some psychological needs for "a day in court" but can also impede settlement goals). See also Kimberly K. Kovach & Lela P. Love, "Evaluative" Mediation is an Oxymoron, 14 ALTERNATIVES TO HIGH COST LITIG. 31, 31-32 (1996) (viewing evaluative mediation as more akin to "case evaluation, neutral expert opinion and non-binding arbitration," that "require different skills and processes").

66. See, e.g., Better Business Bureau ("BBB"), *BBB Auto Line*, available at <http://www.lemonlaw.bbb.org> (last visited Oct. 2003) (providing information regarding the BBB's program for resolving consumers' Lemon Law warranty disputes against car manufacturers through conditionally binding arbitration, which produces awards consumers may accept or reject); BBB, *Conditionally Binding Arbitration*, available at <http://www.dr.bbb.org/ComSenseAlt/CondBindRules.asp> (last visited Aug. 15, 2002) (detailing the procedures and rules for BBB's conditionally binding arbitration program); *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 349 (3d Cir. 1997) (refusing to apply the FAA to the BBB's Auto Line conditionally binding arbitration procedure).

Some courts nonetheless have applied the FAA and UAA outside of the acts' purview to summarily enforce ADR agreements.⁶⁷ This has allowed courts to stay litigation and/or compel parties' participation in an ADR procedure without tackling common law contract remedy analysis. Other courts seemingly confused about the acts' applicability have used a vague mix of statutory and contract law. They have failed to articulate coherent analysis or enforcement standards.⁶⁸ They also have neglected to assess facts and equities in determining whether to order parties to participate in an agreed ADR process under contract law.⁶⁹ Contract and FAA/UAA principles may lead to opposite results, for example, where parties' relations are so

67. *United States v. Bankers Ins. Co.*, 245 F.3d 315, 322 (4th Cir. 2001) (staying litigation to enforce a non-binding dispute resolution agreement under the FAA; but nonetheless recognizing that the issue is "not well-settled in the federal courts"); *Wolsey, Ltd v. Foodmaker, Inc.*, 144 F.3d 1205, 1208-09 (9th Cir. 1998) (finding that the FAA governed enforcement of a non-binding arbitration); *Russell County Sch. Board v. Conseco Life Ins. Co.*, No. 1:01CV00131, 2001 WL 1593233, at *1-5 (W.D. Va. Dec. 12, 2001) (unpublished opinion) (holding a non-binding arbitration agreement enforceable under the FAA, but seeming to also apply common law equity factors by noting that non-binding procedures are not futile in light of process and relational benefits); *CB Richard Ellis, Inc. v. American Env'tl. Waste Mgmt.*, No. 98-CV-4183(JG), 1998 WL 903495, at *2 (E.D.N.Y. Dec. 4, 1998) (concluding without analysis that the parties' mediation agreement was governed by the FAA because it "manifests the parties' intent to provide an alternative method to 'settle' controversies" arising under their contract); *Cecala v. Moore*, 982 F. Supp. 609, 612-615 (N.D. Ill. 1997) (enforcing a mediation agreement under the Illinois UAA, but also noting that the court could use "inherent power" to stay litigation pending the "arbitration"); *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 460, 461 (E.D.N.Y. 1985) (applying arbitration law to a non-binding procedure for resolving advertising disputes); *Homes of Legend, Inc. v. McCollough*, 776 So. 2d 741, 746-748 (Ala. 2000) (stretching to interpret an agreement to require non-binding arbitration of Magnuson-Moss Act claims in light of FTC regulations blessing non-binding ADR, but nonetheless applying the FAA to order that the parties participate in the procedure). *But see Brennan v. King*, 139 F.3d 258, 266 n.7 (1st Cir. 1998) (finding a dispute resolution procedure in an employment contract was not arbitration governed by the FAA because it constrained the scope of the arbitrator's authority and limited the effect of the arbitral decision, leaving "little ground for a 'reasonable expectation' that the procedure will resolve the dispute") (citing *Harrison*); *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 349 (3d Cir. 1997) (refusing to apply the FAA to non-binding arbitration pursuant to state Lemon Law procedures that allowed parties to pursue litigation if the arbitration was delayed for more than forty days).

68. *See Stipanowich, supra* note 2, at 868-69 (noting courts' "mixed reactions" to agreements to negotiate or mediate and discussing the varied analyses courts apply to determine enforceability of these agreements).

69. *See supra* p. 1 (discussing Vicky's hypothetical case). *See also Stipanowich, supra* note 2, at 863, 868-69 (warning against application of arbitration statutes to mediation and other non-binding ADR, and discussing difficulties of compelling participation in such processes that generally require parties' cooperation).

strained that participation in an ADR process that calls for cooperation could further damage the relationship. In addition, misapplication of the acts defies legislative constraints on statutory remedies and procedures, and causes "considerable confusion, not to mention bad precedents."⁷⁰ The result is a lingering lack of standards governing enforcement of ADR agreements.

1. *The Neglect of Common Law Remedies in Reliance on Statutory Enforcement of ADR Processes*

The case often cited as supporting application of the FAA and UAA to enforcement of non-binding procedures is *AMF Inc. v. Brunswick Corp.*⁷¹ In that case, the court found that a non-binding ADR procedure was "arbitration" within the FAA in order to require the parties to submit an advertising dispute to the National Advertising Division ("NAD") of the Council of Better Business Bureaus for a non-binding advisory determination under the parties' agreement.⁷² The court seemed to ignore fundamental distinctions between binding and non-binding dispute resolution procedures. It simply applied the FAA to the non-binding procedure based on an assumption that arbitration has become "synonymous with 'mediation' and 'conciliation.'"⁷³

The court's misapplication of the FAA, however, was likely unnecessary. It could have ordered the parties' participation in the NAD procedure under contract law.⁷⁴ The court may have stretched

70. Stipanowich, *supra* note 2, at 863.

71. *AMF, Inc.*, 621 F. Supp. at 460. See also *United States v. Bankers Ins. Co.*, 245 F.3d 315, 322 (4th Cir. 2001) (citing *AMF* and *Wolsey* for the general proposition that non-binding dispute resolution agreements may be enforceable under the FAA).

72. *AMF Inc.*, 621 F. Supp. at 458-60 (defining arbitration loosely to include any submission of a dispute to a third party).

73. *Id.* at 459 (citing G. Taylor, *Preface* to EDWIN E. WITTE, *HISTORICAL SURVEY OF LABOR ARBITRATION* vi, vi (Univ. of PA. Press 1952)). See also Katz, *supra* note 19, at 589-91 (discussing *AMF's* reliance on the FAA and emphasizing that "to conclude for this reason that all ADR clauses are enforceable as arbitration agreements stretches the concept of arbitration too far" and instead proposing that courts should enforce non-arbitral ADR through a decree of specific performance).

74. *AMF, Inc.*, 621 F. Supp. at 461 (finding that even if the FAA did not apply to require enforcement of the ADR procedure, the court could order the parties' participation in the procedure under contract and equitable powers). See also *Parisi v. Netlearning, Inc.*, 139 F. Supp. 2d 745, 750 n.10 (2001) (noting that the *AMF* court relied in part on its "inherent equitable power" to stay litigation and compel the parties' participation in the non-binding procedure); Tim K. Klintworth, *The Enforceability of an Agreement to Submit to a Non-Arbitral Form of Dispute Resolution: The Rise of Mediation and Neutral Fact-Finding*, 1995 J. DISP. RESOL. 181, 189 (describing the court's enforcement of the ADR agreement as based on its "power to grant specific performance of the contract" in light of the non-binding agreement's purpose "to keep

to apply the FAA, however, to avoid traditional judicial doctrines against specific enforcement of private ADR.⁷⁵ This may have been particularly concerning for the *AMF, Inc.* court sitting in New York because these doctrines ambiguously survive in New York case law.⁷⁶ It seems these doctrines should not have been a concern because the NAD procedure would not have displaced the courts.⁷⁷ Nonetheless, the *AMF* court dodged the issue of the agreement's enforceability under New York law because its application of the FAA presumably preempted any state law precluding enforcement of arbitration or ADR agreements.⁷⁸

Similarly, some courts have assumed that the FAA and UAA apply to agreements requiring non-binding arbitration procedures that are subject to trial de novo if the award exceeds a certain amount.⁷⁹ In applying the acts to these agreements, some courts have ignored the trial de novo provisions. These courts have treated the arbitration determinations as final and subject only to limited review.⁸⁰

future disputes out of court" and resulting inadequacy of ordering damages for breach).

75. See *infra* Part II (explaining traditional "ouster" and "revocability" doctrines, and "public policy" rationales for courts' blanket refusal to enforce private dispute resolution in the nineteenth and early twentieth centuries).

76. See *Meacham v. Jamestown, Franklin & Clearfield R.R.*, 211 N.Y. 346 (N.Y. 1914) (refusing to specifically enforce an arbitration agreement because it "ousted" courts of their jurisdiction).

77. See *infra* notes 121-23 and accompanying text (discussing traditional hostility to arbitration that gave rise to ouster and revocability doctrines).

78. See *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding FAA preempts state law inhibiting arbitration).

79. See, e.g., *Schaefer v. Allstate Ins. Co.*, 590 N.E.2d 1242, 1244-51 (Ohio 1992) (assuming the FAA/UAA remedial scheme must apply to non-binding arbitration, failing to even consider that such private dispute resolution procedures may be governed by contract law); *Parker v. American Family Ins. Co.*, 734 N.E.2d 83, 84-86 (Ill. App. Ct.), *cert. denied*, 738 N.E.2d 928 (2000) (explaining the dissension among courts that have considered the enforceability of provisions in uninsured motorist policies that allow trial de novo review after arbitration if the arbitration award exceeds a certain amount). See also Jennifer L. Shaw, Note, *The Tie that Binds: Arbitration in Ohio After Schaefer v. Allstate Ins. Co.*, 22 CAP. U. L. REV. 779, 779-81, 795-97 (1993) (emphasizing the negative practical effect on non-binding dispute resolution of the *Schaefer* court's failure to acknowledge the enforceability of trial de novo provisions).

80. *Field v. Liberty Mut. Ins. Co.*, 769 F. Supp. 1135, 1140-42 (D. Haw. 1991) (finding trial de novo would destroy arbitration's value, and thus striking the provision and requiring limited judicial review under Hawaii's arbitration statute); *Godfrey v. Hartford Casualty Ins. Co.*, 16 P.3d 617, 621-23 (Wash. 2001) (en banc) (holding trial de novo provision unenforceable because parties "cannot submit a dispute to arbitration only to see if it goes well for their position before invoking the court's jurisdiction"; further explaining that it would ignore the trial de novo provision because arbitration law "does not contemplate non-binding arbitration" and courts will not "condone what amounts to a waste of judicial resources"); *Huizar v. Allstate Ins. Co.*, 952 P.2d 342, 346-49 (Colo. 1998) (en banc) (holding that insurance

Other courts have applied the acts to allow for post-arbitration trial of cases on the merits.⁸¹ Meanwhile, some courts have recognized that these ADR agreements are outside the FAA/UAA purview, but have failed to provide clear and coherent common law enforcement analysis.⁸²

agreement allowing either party to request trial de novo if the award exceeded \$25,000 was against public policy); *Schaefer*, 590 N.E.2d at 1244-51 (holding non-binding "arbitration" is not enforceable as true arbitration because arbitration's core purpose is to finally determine disputes without court involvement); *Slaiman v. Allstate Ins. Co.*, 617 A.2d 873 (R.I. 1992) (holding trial de novo provision violates public policy); *Parker*, 734 N.E.2d at 84-86 (holding trial de novo clause in uninsured motorist policy violated public policy because it harmed arbitration's value and unfairly favored insurers); *Spalsbury v. Hunter Realty, Inc.*, No. 76874, 2000 WL 1753436 at *3 (Ohio Ct. App. Nov. 20, 2000) (unpublished opinion) (concluding that even if Hunter had been party to the arbitration agreement, the non-binding clause was void as against public policy); *Petersen v. United Services Auto. Assoc.*, 955 P.2d 852, 854-56 (Wash. Ct. App. 1998) (voiding trial de novo provision because "[t]he purpose of arbitration is to avoid the courts to resolve a dispute"); *Saika v. Gold*, 56 Cal. Rptr. 2d 922, 923-27 (Cal. Ct. App. 1996) (voiding trial de novo provision in physician's contract with his patient); *Goulart v. Crum & Forster Personal Ins. Co.*, 271 Cal. Rptr. 627, 627-28 (Cal. Ct. App. 1990) (holding insurance code arbitration provision prevented either party from seeking trial de novo); *Zook v. Allstate Ins. Co.*, 503 A.2d 24, 25-27 (Pa. Super. Ct. 1986) (finding trial de novo provision ambiguous and thus unenforceable, especially because "a court of competent jurisdiction is only empowered to disturb the arbitration award if there is evidence of fraud, misconduct, corruption or some other irregularity which caused the rendition of an unjust, inequitable or unconscionable award").

81. See *Hayden v. Allstate Ins. Co.*, 5 F. Supp. 2d 649, 651-53 (N.D. Ind. 1998) (refusing to enforce insurance contract provision allowing either party to request trial de novo if the award exceeded Indiana financial responsibility limits); *Bruch v. CAN Ins. Co.*, 870 P.2d 749, 751-52 (N.M. 1994) (enforcing trial de novo clause in insurance arbitration provision although the courts "strongly encourage final settlement by arbitration").

82. See *Roe v. Amica Mut. Ins. Co.*, 533 So. 2d 279, 281 (Fla. 1988) (finding Florida's enactment of the UAA in the Florida Arbitration Code did not apply to a non-binding arbitration award rendered pursuant to an arbitration agreement allowing either party to seek trial de novo); *Liberty Mut. Fire Ins. Co. v. Mandile*, 963 P.2d 295, 296-300 (Ariz. Ct. App. 1997) (allowing appeal of arbitration award under contract incorporating an appeal provision because it found that the proceeding properly could be part of contractual arbitration procedures); *Cohen v. Allstate Ins. Co.*, 555 A.2d 21, 23 (N.J. Super. Ct. App. Div. 1989), *cert. denied*, 563 A.2d 846 (N.J. 1989) (finding trial de novo clause in uninsured motorist contract was enforceable in order to effectuate the contractual intent of the parties). See also *Dluhos v. Strasberg*, 321 F.3d 365, 366-68 (3d Cir. 2003) (holding UDRP is not arbitration subject to arbitration law); *Parisi*, 139 F. Supp. at 749-53 (correctly concluding that a UDRP determination is not an arbitration award governed by the FAA's review and enforcement provisions); Stephen J. Ware, *Domain-Name Arbitration in the Arbitration-Law Context: Consent To, and Fairness of the UDRP*, 6 J. SMALL & EMERGING BUS. L. 129, 149 (2002) ("Certainly, the UDRP does not fit easily into the framework of arbitration law found in the FAA and the many cases applying it.").

Courts also have applied arbitration law to mediation they admit is not "arbitration." These courts simply assume arbitration and non-binding ADR processes are functionally and legally equivalent.⁸³ One court, for example, summarily applied arbitration law to specifically enforce an agreement to mediate after declaring that arbitration and mediation are "both accepted methods utilized for dispute resolution" and are in contract clauses that are "generally similar."⁸⁴ The court ignored fundamental differences between arbitration and mediation, and said nothing regarding their divergent rules, procedures, and outcomes.⁸⁵

Still another court effectually rewrote medical managed care agreements requiring non-binding ADR by glossing over the agreements' language to order binding arbitration. The court seemed to assume that the FAA was its only enforcement tool. The contracts at issue required the parties to participate in various ADR processes.⁸⁶ The court summarily declared, however, that the subscribers' and physicians' managed care claims were within FAA purview merely because they affected interstate commerce.⁸⁷ The court glossed over its finding that the individual agreements required negotiation, "a meet and confer process," and other non-binding procedures.⁸⁸ The court also seemed to ignore its finding that one contract required "negotiation, mediation and/or arbitration" initiated by either party and did not provide a unilateral power to compel arbitration.⁸⁹ The

83. *Coburn v. Grabowski*, No. CV 960134935, 1997 WL 309572, at *1 (May 29, 1997) (unpublished opinion) (applying arbitration law to require that the parties submit disputes to mediation in accordance with their agreement before bringing claims in court).

84. *Id.*

85. *Id.* It likely was appropriate for the court to require the parties' participation in the agreed mediation. The court, however, could have applied the proper contract analysis to accomplish that result instead of ignoring fundamental distinctions between mediation and arbitration. See *Stipanowich*, *supra* note 2, at 863 (emphasizing "significant differences among ADR processes").

86. *In re Managed Care Litig.*, 132 F. Supp. 2d 989, 992 (S.D. Fla. 2000).

87. *Id.* at 992-1007. The court does not quote or analyze the language of many of the individual agreements although it acknowledges that the agreements require various procedures. *Id.* at 1000-07. This does not figure in the court's conclusion that the FAA applies to all of the agreements.

88. *Id.* at 1002, 1004-05, 1007-08 (noting WellPoint Health Network, Inc. contract required "meet-and-confer process" and a CIGNA Health Corp. contract required negotiation as preconditions to arbitration, but ignoring these provisions and simply ordering arbitration under these contracts).

89. *In re Managed Care Litig.*, 132 F. Supp. 2d at 1003-04. The court found that the agreement only gave Prudential, the proponent of arbitration, power to compel mediation after negotiation failed. *Id.* at 1004.

contract expressly gave parties the option to mediate and “only permit[ed] arbitration at this stage of the dispute resolution process by mutual agreement.”⁹⁰ Despite these findings, however, the court ordered the parties to arbitrate under the FAA.⁹¹

Courts also have applied an interpretation presumption for binding arbitration in order to apply FAA/UAA provisions to an ADR agreement. In *Porter & Clements, L.L.P. v. Stone*, the court applied this presumption in finding that a legal fee agreement requiring a third party to “set fair value” for assets received in settlement called for binding arbitration governed by the state’s UAA.⁹² The court presumed the procedure was binding arbitration because “the Texas Arbitration Act necessarily contemplates that the arbitration award will be binding,” and “makes no provision for a non-binding procedure.”⁹³ The court seemed to assume that the FAA/UAA scheme was its only means for enforcing private dispute resolution contracts. In doing so, it overlooked common law enforcement tools and the FAA/UAA’s limited application to awards on which the parties have agreed that judgment may be entered.⁹⁴

90. *Id.* at 1004.

91. *Id.* at 1007. The opinion is confusing because it states that Dr. Porth had the option to compel mediation or arbitration, and makes clear that the agreement did not give Prudential the unilateral power to compel arbitration. Yet, the order simply granted Prudential’s motion to compel arbitration. *In re Managed Care Litig.*, 132 F. Supp. 2d at 1007.

92. *Porter & Clements, L.L.P. v. Stone*, 935 S.W.2d 217, 220-24 (Tex. Ct. App. 1996). The contract provided that any dispute regarding the fee arrangement shall be referred to arbitration by an arbitrator appointed by the senior United States District Judge for the Southern District of Texas. For example, if you receive intangible or illiquid assets such as contract or lease provisions by way of settlement, and if we are unable to agree on their fair value, an arbitrator will set fair value for division purposes.

Id. at 220.

93. *Id.* at 221. The court found the decision in *McKee v. Home Buyers Warranty Corp. II*, 45 F.3d 981, 983-85 (5th Cir. 1995), persuasive. *Id.* at 220-21. The *McKee* court construed a clause to necessarily provide for binding arbitration because applicable Louisiana law contemplated binding arbitration, although the clause’s language required “conciliation and/or arbitration” which was to “precede any litigation attempted by either party.” *Porter & Clements, L.L.P.*, 935 S.W.2d at 221 n.5 (citing and quoting *McKee*, 45 F.3d at 983). The *McKee* court focused on the clause’s provision that the procedure be conducted pursuant to “regulations of the AAA or other mutually agreeable arbitration service,” and the AAA’s rules providing for binding arbitration — ignoring that the AAA also has rules for mediation. *Id.* The clause also required that a dispute “be resolved or an award rendered by the arbitrator within 40 days” from filing, which could be interpreted to allow for a non-binding award. *Id.*

94. See *supra* notes 40-41 and accompanying text (discussing the FAA scheme).

It may seem reasonable to summarily enforce all dispute resolution agreements under the FAA and UAA.⁹⁵ Indeed, "some courts have eschewed functional analysis in favor of broader interpretation of federal or state arbitration law to underpin the enforceability of [mediation and other non-binding dispute resolution] agreements."⁹⁶ Enforcement under the FAA and UAA, however, eschews the flexibility of contract law remedies. This flexibility was important to policy-makers' conclusion that the FAA/UAA scheme is "wholly inappropriate" for enforcing non-binding procedures such as mediation.⁹⁷ Furthermore, courts should not hinder and confuse development of contract remedy analysis of ADR agreements by misapplying the FAA and UAA to these agreements.⁹⁸

2. *The Vague Application of the FAA and UAA by Analogy*

Some courts seem to apply the FAA and UAA by analogy in enforcing ADR agreements.⁹⁹ This may be appropriate in some cases.

95. See *supra* note 8 (noting some commentators' approval for courts' application of the FAA to non-binding arbitration). But see Edward Wood Dunham, *Enforcing Contract Terms Designed to Manage Franchisor Risk*, 19 FRANCHISE L.J. 91, 92 (2000) (noting that courts have enforced mediation under FAA § 3, but emphasizing that it "is far from clear whether that is correct and there is likely to be further litigation on this issue").

96. Stipanowich, *supra* note 2, at 860-61 (citing and emphasizing some court's broad application of FAA to any agreement evidencing parties' intent to "settle" a dispute out of court—"a rationale that would extend the purview of the FAA to virtually any ADR process!").

97. *Id.* at 862-64 (further emphasizing that the FAA/UAA scheme was intended to govern only binding arbitration that serves as "an all-purpose substitute for litigation"). Not only is the scheme inappropriate for mediation enforcement, but also it has led to confusion and bad legal precedents. *Id.*

98. See Stipanowich, *supra* note 2, at 863 (stating that courts may apply arbitration acts, if at all, only by analogy "with great caution, and with a clear appreciation of the significant differences among ADR processes and the danger of misapplying specific provisions of arbitration statutes and associated case law").

99. See e.g., *Centr. Fla. Invs., Inc. v. Parkwest Assocs.*, 40 P.3d 599, 605-07 (Utah 2002) (compelling arbitration without explaining whether or why the acts would apply to the contract's requirement that the parties submit disputes to a hybrid arbitration that left parties free to void the agreement if "agreement cannot be reached within 60 days from the beginning of an arbitration process"); *Marshall v. U.S. Home Corp.*, No. 20573, 2002 WL 274457, at *1 (Ohio Ct. App. Feb. 27, 2002) (remanding for specific enforcement of agreement requiring parties to mediate or arbitrate claims concerning construction of a new home, but failing to provide analysis or even state whether it was applying the FAA or contract law); *Robbins-Hutchens, Liberty Hardware Mfg. Corp.*, No. 101CV0046, 2001 WL 823495, at *4 (M.D.N.C. June 14, 2001) (unpublished opinion) (holding that an employee's claims "are subject to mediation and binding arbitration," but leaving it ambiguous whether the parties must submit disputes to mediation before arbitration by ambiguously staying litigation "pending binding arbitration").

However, courts should analogize to the acts with great caution and appreciation for differences among ADR processes' and parties' bargaining contexts.¹⁰⁰ Courts also should be careful not to assume that if the acts do not require enforcement of an ADR agreement, then the agreement is unenforceable.¹⁰¹

Courts' treatment of appraisal agreements exemplifies how courts' preoccupation with applying the FAA and UAA has led to application of confused hybrids of statutory and contract law.¹⁰² An appraisal agreement generally requires parties to submit particular issues, such as valuation and loss under an insurance contract, to a

100. See Stipanowich, *supra* note 2, at 863 (proposing cautioned use of arbitration acts by analogy). See also *infra* p. 61-62 (discussing flexible, process-oriented enforcement of ADR agreements).

101. See *Cumberland and York Distribs. v. Coors Brewing Co.*, No. 01-244-P-H, 2002 WL 193323 (D. Me. Feb. 7, 2002) (assuming the FAA provides the only means for enforcing ADR); *HIM Portland, LLC v. Devito Builders, Inc.*, 211 F. Supp. 2d 230, 232-33 (D. Me. 2002) (finding the FAA did not apply to require enforcement of agreement to arbitrate because parties had not triggered the arbitration requirement by first seeking mediation as required by the parties' agreement; further assuming that the parties were free to litigate "because the Court cannot order parties to mediate"); *Solomon v. Progressive Cas. Ins. Co.*, 685 A.2d 1073 (R.I. 1996) (affirming without analysis summary dismissal of an action for breach of a mediation agreement); *Kirshenmen v. Super. Ct.*, 36 Cal. Rptr. 2d 166 (Cal. Ct. App. 1994) (finding there was no statutory authority to compel compliance with an oral agreement to mediate and, even if there was, it would not compel mediation because defendant sought timely withdrawal from the process). See also UNIF. MEDIATION ACT § 5(i) (Annual Meeting Draft, Jul. 23-30, 1999) (stating courts' reluctance to enforce mediation agreements because unlike arbitration, mediation may not end the controversy); Stipanowich, *supra* note 2, at 868-69 (discussing debate over futility versus utility of specifically enforcing ADR agreements that arguably require parties' cooperation to be successful); Thompson, *supra* note 21, at 11 (suggesting a significant drawback to pre-dispute mediation agreements is courts' reluctance to enforce such agreements because a non-binding procedure is a "somewhat nebulous form of dispute resolution that some courts feel is too indefinite," and concluding that "the law is not settled as to the enforceability of mediation clauses"). But see *County of Jefferson v. Barton-Douglas Contractors, Inc.*, 282 N.W.2d 155, 158 (Iowa 1979) (applying common law principles to conclude that enforcing a non-statutory arbitration agreement would defeat ADR goals by increasing expense and delay, and creating potential for inconsistent results).

102. 15 LEE R. RUSS & THOMAS F. SEGALLA, *COUCH ON INSURANCE* § 209:16, 27-28 (3d ed. 1999) (discussing courts' disagreement regarding whether appraisal provisions are "arbitration agreements" under arbitration laws and compiling cases supporting contradictory conclusions; and further explaining that some courts seem to apply only certain provisions of arbitration acts to appraisal issues). See also Wesley A. Sturges & William M. Sturges, *Appraisals of Loss and Damage Under Insurance Policies*, 13 U. MIAMI L. REV. 1 (1958) (discussing and critiquing courts' ambiguous application of common and statutory law to enforcement of agreements to submit disputes to appraisal).

third party for a binding or non-binding determination.¹⁰³ Traditionally, some courts would order parties' compliance with appraisal agreements under common law. This was because, unlike arbitration, an appraisal generally did not "oust[] the courts of jurisdiction, but [left] the general question of liability to be judicially determined."¹⁰⁴ Modern contract law also provides courts with the power to enforce agreements to participate in appraisal processes.¹⁰⁵

Nonetheless, some courts have been quick to classify appraisals as arbitration in order to enforce them under the FAA/UAA statutory scheme.¹⁰⁶ Some of these courts have focused unduly on the arbitration label, although they could have analyzed an agreement under

103. See Russ & Segalla, *supra* note 102, at § 209:16, 27-28 (discussing varied appraisals).

104. Sec. Printing Co. v. Conn. Fire Ins. Co. of Hartford, 240 S.W. 263, 268 (Mo. Ct. App. 1922) (finding plaintiff was required to comply with an appraisal requirement before bringing action on an insurance policy). Indeed, modern courts have continued to rely on this "ouster" rationale in order to justify enforcement of appraisal agreements. See Garretson v. Mountain W. Farm Bureau Mut. Ins. Co., 761 P.2d 1288, 1290 (Mont. 1988) (finding common law barring specific enforcement of arbitration provisions did not apply to an appraisal agreement because appraisal "does not oust the jurisdiction of the courts, but only requires a certain character of evidence of a fact in controversy").

105. See *Wailua Assocs. v. Aetna Cas. & Sur. Co.*, 904 F. Supp. 1142, 1147-49 (D. Haw. 1995) (unnecessarily labeling insurance appraisal arbitration in enforcing the procedure). In *Wailua Assocs.*, the court's classification of an insurance valuation procedure as arbitration was not necessary to the court's conclusion that the appraisal's scope and procedures were determined by the parties' agreement. Nonetheless, the court's labeling the procedure arbitration may matter in dictating its enforcement and review of appraisal determinations. *Id.*

106. *Childs v. State Farm Fire & Cas. Co.*, 899 F. Supp. 613, 615 (S.D. Fla. 1995) (granting a "Motion to Compel Arbitration" under the state's UAA to enforce an insurance contract provision requiring the parties to submit valuation and loss determinations to appraisal "provided the appraisal can be completed within thirty (30) days"); *Wailua Assoc.*, 904 F. Supp. at 1147-49 (finding an appraisal was "arbitration" under the FAA); *Christiansen v. First Ins. Co. of Haw., Ltd.*, 967 P.2d 639, 649-56 (Ct. App. 1998) (holding an appraisal may "imply an agreement between the parties to arbitrate" governed by the state's UAA, and finding that although bad faith claims arising out of an insurance contract were outside of the scope of the appraisal provision, other contract issues were "referable" to the process under Hawaii's arbitration act), *rev'd on discrete equitable tolling issue but aff'd in all other respects*, 963 P.2d 345, 349, n.7 (Haw. 1998) (only discussing equitable tolling and noting that it could not consider the Court of Appeals recent Amendment vacating discussion regarding the doctrine because the petition for certiorari had already been granted); *Meineke v. Twin City Fire Ins. Co.*, 892 P.2d 1365, 1369 (Ariz. Ct. App. 1994) (concluding quickly that "appraisal is analogous to arbitration" and therefore applying arbitration law to a dispute regarding an insurance policy appraisal clause; but affirming the trial court's refusal to compel appraisal because the insurance company unreasonably delayed demanding the appraisal).

contract law.¹⁰⁷ In one case, the court needlessly focused on whether the FAA applied to an appraisal provision in an insurance contract although the insured could not compel the appraisal under arbitration or contract law. The insured's coverage claim was outside the scope of the appraisal provision that applied to disputes regarding the amount of loss.¹⁰⁸ Under both arbitration and contract law, the arbitrator had no power to decide the coverage issue.¹⁰⁹

Some courts appropriately refrain from labeling appraisal processes arbitration under the FAA or UAA.¹¹⁰ Many of these courts, however, analogize to the acts without providing analysis or guidance for legal development. In a recent Utah case, for example, the court declared without analysis that appraisals are specifically enforceable.¹¹¹ The court generalized: "Appraisal clauses, like other contractual clauses requiring alternative dispute resolution, are strictly enforceable. Therefore, a court must compel compliance with a valid appraisal clause if one party demands appraisal."¹¹² To be sure, this declaration was overbroad. Furthermore, it was largely unnecessary. The court based its denial of preclusive effect to an order dismissing claims outside an appraisal provision on contract scope and interpretation.¹¹³

107. See *Rastelli Bros., Inc., v. Netherlands Ins. Co.*, 68 F. Supp. 2d 440, 443-47 (D.N.J. 1999) (focusing the entire legal analysis on whether the agreement requires "arbitration" under the FAA).

108. *Id.* at 442-43.

109. *Id.* at 446-47. See also *Cap City Prods. Co., Inc. v. Louriero*, 753 A.2d 1205, 1210 (N.J. Super. Ct. App. Div. 2000) (refusing to review a third-party valuation for legal error regardless of whether the procedure was labeled arbitration or appraisal, where the parties had agreed the valuation would be "binding"). But see *Elberon Bathing Co., Inc. v. Ambassador Ins. Co., Inc.*, 389 A.2d 439, 445-47 (N.J. 1978) (finding third party valuation of fire damage under an insurance agreement was an appraisal not subject to New Jersey's Arbitration Act, and therefore rejecting defendant's argument that formalities of the Act applied).

110. See *Miller v. USAA Cas. Ins. Co.*, 44 P.3d 663, 673-79 (Utah 2002) (finding an appraisal was not arbitration governed by the state's adoption of the UAA).

111. *Id.* at 674-75.

112. *Id.* at 675. The court provides no specific performance analysis. It is curious that the court emphasizes the inapplicability of arbitration law to non-binding dispute resolution procedures, although the same court had just summarily applied arbitration analysis to enforce a conditionally binding process that only became binding if the parties reached agreement within 60 days from inception of the process (i.e., mediation). See *Central Florida Invs., Inc. v. Parkwest Assocs.*, 40 P.3d 599, 603 (Utah 2002).

113. See *USAA Casualty Ins. Co.*, 44 P.3d at 676-79. The court interprets coverage of the appraisal clause more narrowly because it is not an arbitration agreement. *Id.* at 675-78. Perhaps the court would find the claims outside of an agreement it labeled arbitration, but that is unclear from the court's opinion, especially in light of its reversal of the district court and emphasis of the distinctions between arbitration

Some courts have appropriately looked to contract language in refusing to apply the FAA and UAA to appraisal determinations. For example, courts have found that the acts do not apply to enforcement of appraisal determinations that are not expressly final or will not end the parties' liability disputes.¹¹⁴ These courts appropriately analyze whether a procedure is sufficiently final to be arbitration governed by the acts.¹¹⁵ They nonetheless seem to abandon this analysis and assume the FAA and UAA apply when ordering parties' *initial participation* in a process.¹¹⁶ This results-oriented and disjointed application of the acts to appraisals distorts the law.

It is true that the results in some appraisal cases may be the same under contract and arbitration law. However, that is not always true and the FAA and UAA prescribe procedures and remedies that are not applicable under common law.¹¹⁷ For example, a court's application of the FAA to a non-binding determination may allow the court to apply the Act's §10 review to the determination.¹¹⁸ Furthermore, the courts' varied and contradictory approaches confuse the law. This leaves parties to draft agreements at their peril. It is time

and appraisal. Furthermore, it seems that the court's determination that the procedure was not subject to the state's UAA drives its conclusion that a dismissal based on an appraisal cannot be given preclusive effect. *Id.* at 678-79.

114. See *Portland Gen. Elec. Co. v. U.S. Bank Tr. Nat'l Assoc.*, 218 F.3d 1085, 1090 (9th Cir. 2000) (finding that state contract law, and not the FAA or other arbitration law, governed confirmation of an appraiser's determination of the fair market value of two turbine generators under a lease agreement); *Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1061 (5th Cir. 1990) (finding that an insurance appraisal was not arbitration governed by the FAA and therefore remanding to the district court to review an appraisal determination under state law, which may require a jury trial and application of different standards than those required under the FAA); *Kelley v. United States*, 19 Cl. Ct. 155, 163-64 (Cl. Ct. 1989) (holding that the FAA provisions and policies did not apply to enforcement of an appraisal provision in an option contract because the parties did not consider the appraiser's decision binding and final, but instead treated the procedure as a condition precedent to exercise of the option that failed).

115. See *e.g.*, Schmitz, *supra* note 3, at 166-69 (discussing when appraisal procedures are classified as arbitration).

116. See *Portland Gen. Elec. Co.*, 218 F.3d at 1090 (refusing to apply FAA to review and confirm appraiser's determination); *Hartford Lloyd's Ins. Co.*, 898 F.2d at 1061 (same). At least one court, however, has determined an award to be non-binding, but nonetheless subject to FAA limited review. See *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742, 746-52 (8th Cir. 2003) (finding third party determination pursuant to insurance policy requiring parties to submit disputes to a "board of arbitration" as a "condition precedent to any right of action" was non-binding, but nonetheless subject to FAA § 10 review).

117. See *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 345-52 (3d. Cir. 1997) (refusing to apply FAA interlocutory appeal provisions to non-binding arbitration).

118. See *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d at 746-52 (applying FAA § 10 review to a non-binding third-party determination).

to clear this confusion in order to foster efficient and creative contracting based on a cohesive and equitable approach for enforcing ADR agreements.

II. LEGAL CLUTTER CREATED BY FAULTY TRADITIONAL DOCTRINES PRECLUDING ENFORCEMENT OF PRIVATE DISPUTE RESOLUTION CONTRACTS

Why have courts been eager to apply the FAA/UAA scheme to summarily order parties to participate in ADR procedures? It may be that courts view the acts' scheme as an easy avenue to clear court dockets.¹¹⁹ Applying the FAA and UAA allows courts to hurry parties out of court without first tackling difficult common law contract remedy analysis. Courts also may seek refuge in the relative clarity of the FAA/UAA scheme in an effort to avoid traditional judicial doctrines and attitudes that precluded, or unduly limited, specific enforcement of agreements to submit disputes to private dispute resolution processes.¹²⁰ Traditional judicial jealousies of arbitration led courts to create the "ouster" and "revocability" doctrines.¹²¹ The revocability doctrine stated that arbitration agreements were freely revocable by any disputant, while the ouster doctrine precluded enforcement of arbitration agreements because they "oust the courts of

119. It is unclear precisely what drives judicial decision-making, and why courts have over-applied arbitration statutes to ADR agreements. See Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 829-30 (2001) (concluding that "judges rely on the same cognitive decision-making process as laypersons and other experts, which leaves them vulnerable to cognitive illusions that can produce poor judgments," and that regardless of whether judges fully understand the law, "they might still make systematically erroneous decisions under some circumstances simply because of how they — like all human beings — think"). However, ADR has been seen as a means for easing judicial workloads. See, e.g., *IDS Life Ins. Co. v. SunAmerica, Inc.*, 103 F.3d 524, 528 (7th Cir. 1996) (Posner, J.) (noting "Congress's emphatically expressed support for facilitating arbitration in order to effectuate private ordering and lighten the caseload of the federal courts"). Still, some judges lament the loss of interesting cases to private processes.

120. *Sturges & Reckson*, *supra* note 21, at 822-25, 831-41 (noting development of common law refusal to specifically enforce agreements to arbitrate "[c]ame down from quite ancient times as some original and fundamental tenet of equity jurisprudence" but that "the general tenor of the statements is more by way of report than by reason and adjudication").

121. See CLARENCE F. BIRDSEYE, *ENCYCLOPEDIA OF GENERAL BUSINESS AND LEGAL FORMS* 205 (1924) (emphasizing common law courts' jealousy and opposition to arbitration, despite their enforcement of other contracts); Charles Newton Hulvey, *Arbitration of Commercial Disputes*, 15 VA. L. REV. 238, 239 (1929) (stating reasons courts did not enforce arbitration agreements).

jurisdiction,” or displace judicial power to resolve disputes.¹²² Although these doctrines originally targeted binding arbitration, they have contributed to an overly narrow analysis of ADR agreements.¹²³ Remnants of these doctrines seem to drive some courts and commentators to assume mediation and other ADR agreements are not specifically enforceable under common law.¹²⁴ This assumption is not true. Accordingly, it is time to let go of these doctrines and narrow assumptions in order to clear the way for modern contract enforcement of ADR agreements.¹²⁵

A. *Traditional Anti-Enforcement Doctrines Based on Judicial Jealousy and Distrust of Private Dispute Resolution*

Today, the FAA preempts application of state law that hinders enforcement of arbitration in transactions affecting interstate commerce.¹²⁶ Arbitration and ADR agreements not governed

122. See Hulvey, *supra* note 121, at 239-41 (discussing doctrine refusing to compel performance of an agreement “intended to oust the courts of their jurisdiction”).

123. See Katz, *supra* note 19, at 583-87 (critiquing courts’ refusal to specifically enforce non-binding dispute resolution agreements based on common law principles that “equity will not enforce a ‘vain order,’ or require litigants to do something that would be ineffectual or futile,” and breach of such agreements causes no harm because when “one party is determined not to settle, the other party is not harmed by the refusal to engage in ADR”); Klintworth, *supra* note 74, at 184-89 (explaining that one reason modern courts have been reluctant to enforce non-arbitral dispute resolution agreements without statutory backing is because they view these agreements as “[taking] away some of the courts [sic] power,” and further emphasizing that “many courts have worried that alternative dispute resolution processes are robbing them of their power and jurisdiction to deal with cases that they would normally have a right to govern”). Cf. Phillips, *supra* note 32, at 1259-61 (emphasizing that courts’ blanket refusal to specifically enforce executory arbitration agreements was based on flawed judicial doctrine reflecting courts’ hostility to private dispute resolution, but that courts continued to blindly apply the doctrine even when they admitted its complete lack of logic).

124. See Thompson, *supra* note 21, at 31 (assuming that agreements to mediate or “negotiate-in-good-faith” are generally not specifically enforceable under common law).

125. See BIRDSEYE, *supra* note 121, at 205-07 (discussing enactment of arbitration laws to combat judicial opposition to arbitration and common law courts’ eventual disapproval of non-enforcement doctrines and adoption of “a much more liberal attitude because they came to realize that arbitration might be their handmaiden rather than their enemy; and also that the very strictness, rigidity and diffuseness of court practice are a hindrance to the speedy determination of trade and other disputes which are largely questions of technical fact”).

126. See *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Perry v. Thomas*, 482 U.S. 483, 492 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (all confirming the FAA’s application in federal and state courts to all contracts within the vast preemptive power of the Commerce Clause).

by the FAA, however, have continued to fall victim to state law incorporating anti-arbitration doctrines.¹²⁷ There are valid reasons to question federal pro-arbitration policy, especially in uneven bargaining contexts and cases involving public statutory rights.¹²⁸ Courts should not, however, mask their concerns in espousals of antiquated ouster and revocability doctrines.¹²⁹ These doctrines are based on faulty legal assumptions and mis-

127. See *State of Nebraska v. Nebraska Ass'n of Pub. Employees et al.*, 477 N.W.2d 577, 581-83 (Neb. 1991) (finding that the state's adoption of the UAA violates Nebraska's constitutional requirement that "[a]ll courts shall be open, and every person, for any injury done him . . . shall have a remedy by due course of law" to the extent the UAA ousts courts of jurisdiction by providing for private determination of future disputes); *Huntington Corp. v. Inwood Constr. Co.*, 348 S.W.2d 442, 444-46 (Tex. Civ. App. 1961) (holding that Texas law voids pre-dispute arbitration agreements because they attempt to oust the courts of jurisdiction).

128. Fairness concerns have been prevalent where a party with superior bargaining power arguably imposes arbitration on "little guy" consumers or employees. See Sarah Rudolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759, 769 (2001) (critiquing fairness of binding arbitration of employment claims); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U.L.Q. 637, 637 (1996) (critiquing binding arbitration of consumer and employment claims where there is unequal bargaining power); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170-81 (9th Cir. 2003) (refusing to compel employee to arbitrate discrimination claims where "the stark inequality of bargaining power" between employer and employees allowed employer to impose one-sided arbitration provisions on employees). Furthermore, serious concerns arise regarding the appropriate arbitrability of statutory claims and arbitrations' constitutional fairness. See Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1054-90 (2000) (discussing constitutional implications of arbitrations conducted under the FAA). In addition, some have questioned arbitration's impact on the judiciary's role in developing law and ensuring proper resolution of disputes. See, e.g., Jackson Williams, *What the Growing Use of Pre-dispute Binding Arbitration Means for the Judiciary*, 85 JUDICATURE 266, 266-67 (2002) (warning that arbitration poses a threat "to a vital, independent judiciary" and its growth will result in "a reversal of the traditional roles of courts and private arbitration").

129. See, e.g., ALA. CODE § 8-1-41 (2003) (prohibiting specific enforcement of agreements "to submit a controversy to arbitration"); *Lee v. YES of Russellville, Inc.*, 784 So. 2d 1022, 1025 (Ala. 2000) (recognizing that "[i]t is well settled that Alabama law disfavors pre-dispute agreements to submit disputes to binding arbitration," but applying the FAA to an agreement requiring the parties to submit their disputes to mediation followed by arbitration). See also *Kelley v. Benchmark Homes, Inc.*, 550 N.W.2d 640 (Neb. 1996) (applying the FAA to compel non-binding arbitration, perhaps in light of the Nebraska Supreme Court's strong denouncement of arbitration five years earlier in *Nebraska Ass'n of Pub. Employees*, 477 N.W.2d at 581-83); *Pa. Life Ins. Co. v. Simoni*, 641 N.W.2d 807, 812 (Iowa 2002) (finding arbitration agreement could be specifically enforced in that case because the state's UAA applied instead of Iowa common law that continued to apply the "principle that an agreement to arbitrate is revocable at any time").

guided jealousies of private processes that threatened courts' domain.¹³⁰

1. *Legacy of Lord Coke's Remarks*

Arbitration and ADR pre-date litigation. Courts traditionally viewed these processes as threats to courts' law-making and dispute resolution business — and dollars.¹³¹ This judicial fear and hostility to private dispute resolution manifested itself through courts' creation of the revocability and ouster doctrines. These doctrines gutted the functionality of pre-dispute arbitration agreements by precluding their specific enforcement and leaving parties with the empty remedy of seeking nominal damages.¹³² The business community therefore prompted the adoption of the FAA and UAA to stop application of these erroneous doctrines to arbitration. Business leaders focused on arbitration due to its popularity and binding effect, which made it a greater threat to the courts than conciliation and other non-binding procedures.¹³³

130. See, e.g., *Nebraska Ass'n of Pub. Employees*, 477 N.W.2d at 581-83 (basing refusal to enforce pre-dispute arbitration agreements on Nebraska cases decided in the 1800s, and relying on pre-FAA cases in warning that arbitration will "open a leak in the dyke of constitutional guarantees which might some day carry all away") (quoting *Phoenix Ins. Co. v. Zlotky*, 92 N.W. 736 (Neb. 1902)).

131. See ALAN SCOTT RAU, *ARBITRATION* 57 (2d ed. 2002) (noting the courts' traditional hostility to arbitration may have been due in part to courts' concern that private tribunals would not properly apply the law, but that "more cynically, one might also suppose that it originated in considerations of competition for business, at a time when judges' salaries still depended on fees paid by litigants"); JULIUS HENRY COHEN, *COMMERCIAL ARBITRATION AND THE LAW* 83 (1918) (noting judicial competition with private tribunals and fear that arbitration threatened a significant source of judicial business, as well as judicial jobs linked to the courts' caseloads).

132. See COHEN, *supra* note 131, at 150-52. Courts refused to quantify damages in reference to an award one might have received in arbitration because such amount likely would have been void as a penalty. Therefore, damages were limited to nominal expenses incurred preparing for the arbitration. *Id.* at 151. In contrast to executory agreements, however, final arbitration awards were enforceable through damages or specific performance. WESLEY A. STURGES, *A TREATISE ON COMMERCIAL ARBITRATION AND AWARDS*, 679-80, 701-02 (1930).

133. See *infra* notes 304-12 and accompanying text (discussing prevalence of arbitration among trade and merchant groups). Even before the enactment of the FAA, public policy supported voluntary settlement of legal controversies, especially when they were for small dollar amounts and therefore "of little importance" to the courts. See *Conciliation Law Held Valid*, 6 J. AM. JUD. SOC. 133, 136-43 (1923) (discussing the North Dakota Supreme Court's approval of the state's conciliation statute requiring parties to submit claims for under \$200 to non-binding conciliation procedures, emphasizing that the statute only applies to minor disputes and "the spirit of the law favors voluntary adjustments of legal controversies"). Furthermore, non-binding procedures posed less threat to courts' power to decide disputes and parties' right to a "day in court." *Id.* at 138-50. See also Herbert Harley, *Justice or Litigation?*, 6 VA. L.

The revocability doctrine grew from dicta in Lord Coke's 1609 opinion in *Vynior's Case*.¹³⁴ In that case, the plaintiff recovered on a bond securing an agreement that required the parties to arbitrate any dispute arising out of a contract to perform repair work on certain buildings.¹³⁵ The defendant had refused to honor the arbitrator's decision on the plaintiff's contract claims or to pay the amount due on the bond for failure to comply with the arbitration agreement.¹³⁶ The court ordered the defendant to pay 100 pounds due on the bond for breach of the condition to arbitrate and 20 pounds in damages due to the breach.¹³⁷

At first glance, *Vynior's Case* appears to be a victory for arbitration. In holding the defendant liable on the bond, however, Lord Coke announced what later was dubbed the "revocability doctrine." Coke's needless announcement was that the defendant was free to "countermand [the arbitration agreement], for one cannot by his act make such authority, power or warrant not countermandable which is by law or of its own nature countermandable."¹³⁸

This statement was merely dicta. Moreover, it seems inconsistent with the court's conclusion that the plaintiff was entitled to recover on the bond.¹³⁹ Why was the defendant liable on a bond that secured a revoked or void agreement? This meant that the obligation to arbitrate was inherently revocable, but nonetheless enforceable when stated as the condition for payment on a bond. It seems, however, that if the bond's condition (i.e., submit disputes to arbitration) was revocable, then any revocation would have nullified liability on the bond. In addition, Coke provided no legal basis for revocability of arbitration agreements.¹⁴⁰ Nonetheless, *Vynior's Case* has gained

REV. 143, 147 (1919) (emphasizing that conciliation was less of a threat to courts' power because parties remained free to seek trial if the conciliation did not end in settlement).

134. *Vynior's Case*, 77 Eng. Rep. 595, 599-600 (K.B. 1609).

135. *Id.*

136. *Id.*

137. *Id.* See also Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 598-604 (1928) (discussing facts of *Vynior's Case*, and noting that the plaintiff actually recovered more than he likely would have recovered on the underlying claim). Years later, England adopted the Statute of Fines and Penalties which precluded recovery on arbitration bonds unless justified by actual damages. *Id.*

138. See *id.* at 601 (quoting *Vynior's Case*, 8 Co. at 81b, 82a).

139. Lord Coke's dicta is now widely known among arbitration students and scholars despite its "unsoundness." COHEN, *supra* note 131, at 126-27.

140. See Sayre, *supra* note 137, at 602, n.25 (noting that Coke merely cited cases that provided questionable support, and deemed revocability "the rule").

recognition as "the leading case" establishing the revocability doctrine.¹⁴¹

The revocability doctrine seemed to reflect a traditional notion that arbitrators were merely agents at the will of the parties who appointed them.¹⁴² Under this notion, any party to an arbitration agreement could revoke an arbitrator's authority at any time before the arbitrator rendered an award, even if the parties had agreed the delegation was irrevocable.¹⁴³ This meant that parties to an arbitration agreement faced continual risk that a party fearing defeat could freely denounce the arbitration.¹⁴⁴ Furthermore, courts would order only nominal damages due to breach of an arbitration agreement because they refused to measure damages with reference to an award one might obtain in arbitration.¹⁴⁵

Despite the weak underpinnings of revocability, it became the common law rule.¹⁴⁶ It was accepted by the United States Supreme Court,¹⁴⁷ and incorporated in the first *Restatement of Contracts*.¹⁴⁸

141. Baum & Pressman, *supra* note 27, at 240, n.7; Sayre, *supra* note 137, at 602 (also lamenting limits of *Vynior's Case* because "the decision covers only recovery on the bond").

142. Sayre, *supra* note 137, at 598-99 (explaining that revocability was based upon agency principles regarding "the authority given to the arbitrators and the consequent power to withdraw that authority").

143. *Tobey v. County of Bristol et al.*, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (citing *Vynior's Case* as authority that arbitration submissions are revocable regardless of stipulation to the contrary because one "cannot alter the judgment of law, to make that irrevocable, which is of its own nature revocable").

144. J.P. Chamberlain, *The Commercial Arbitration Law*, 9 A.B.A. J. 523, 523 (1923); Baum & Pressman, *supra* note 27, at 240.

145. Sayre, *supra* note 137, at 604 (noting that one could not suffer injury from having to seek redress in the courts instead of arbitration). *But see* J.P. Chamberlain, *supra* note 144, at 523 (emphasizing that any action for damages did not compensate for "the social advantages of prompt settlement and of relieving the strain upon the courts . . .").

146. *See, e.g., Tobey*, 23 F. Cas. at 1321 (accepting revocability as law); *Elberton Hardware Co. v. Hawes*, 50 S.E. 964, 965-66 (Ga. 1905) (applying revocability to an appraisal contract in concluding that appraisers had no power to choose replacements without the parties' consent); *Ferrell v. Ferrell*, 161 S.W. 719, 721 (Mo. 1913) (refusing to specifically enforce an agreement to select appraisers to determine property value).

147. *See, e.g., Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 121 (1924) ("The federal courts — like those of the states and of England — have, both in equity and at law, denied in large measure, the aid of their processes to those seeking to enforce (sic) executory agreement to arbitrate disputes."); *see also Atlantic Fruit Co. v. Red Cross Line*, 276 F. 319, 322-23 (S.D.N.Y. 1921) (noting the morass of federal and state actions on the parties' claim and declining to express an opinion on the validity of a New York court's specific enforcement of the arbitration submission).

148. "The authority of the arbitrator is revocable by either [party] at any time before an award is made, and though the revocation is a violation of the agreement,

Nonetheless, courts and commentators qualified the doctrine and stated exceptions. For example, they enforced provisions that required third party determination of isolated issues as a pre-condition to litigation of underlying liability claims.¹⁴⁹ The Supreme Court also hedged its acceptance of the doctrine by indicating that a court could enforce an arbitration agreement made a rule of the court.¹⁵⁰

2. *Birth of Ouster Doctrine Precluding Enforcement of Agreements That Threatened Judicial Power*

The revocability doctrine was paired with the "ouster" doctrine. The ouster doctrine precluded specific enforcement of agreements to arbitrate on the theory parties cannot by contract "oust" a court's jurisdiction or power to decide a legal dispute.¹⁵¹ Although the doctrine first appeared in English law, it gained acceptance in American courts and has continued to survive in some courts despite constant criticism.¹⁵²

the injured party is without substantial redress." RESTATEMENT OF CONTRACTS § 550, cmt. A (Proposed Final Draft No. 11, 1932) (providing in the rule that an agreement to arbitrate future disputes "is not illegal" but "will not be specifically enforced, and only nominal damages are recoverable for its breach").

149. RESTATEMENT OF CONTRACTS § 551 (Proposed Final Draft No. 11, 1932) (providing illustrations preserving specific enforcement of appraisal as a condition precedent to litigation). See also 3 AM. JUR., *Arbitration & Award* § 74 (1936) (stating same general rule precluding specific performance of agreements to submit future disputes to arbitration, as well as the exception for "arbitration or appraisal made a valid condition precedent to suit upon a contract"; and further qualifying non-enforcement by stating that a court may stay an action then pending and treat the arbitration "as a mode of trial under authority of the court").

150. *Red Cross Line*, 264 U.S. at 122-25 (finding New York courts could equitably enforce arbitration agreements in their own courts under New York's arbitration statute, and therefore the Court did not have occasion "to consider whether the unwillingness of the federal courts to give full effect to executory agreements for arbitration can be justified"). See also *Hamilton v. Liverpool, London & Globe Ins. Co.*, 136 U.S. 242, 255 (1890) (holding that an appraisal provision stated as a condition precedent to litigation is enforceable because, unlike arbitration, it leaves general questions of liability to the courts).

151. *Kill v. Hollister*, 1 Wils. 129, 95 Eng. Rep. 532 (1746). See also Sayre, *supra* note 137, at 604 (noting that the ouster theory is not even mentioned in the early cases "and certainly has no conscious bearing upon *Vynior's Case*"); Hulvey, *supra* note 121, at 239-41 (describing the policy of the revocability doctrine as refusing to compel performance of an agreement "intended to oust the courts of their jurisdiction").

152. See Chamberlain, *supra* note 144, at 523 (criticizing the ouster doctrine and advocating arbitration legislation in the early 1900s); *Park Constr. Co. v. Indep. Sch. Dist.* No. 32, 296 N.W. 475, 477 (Minn. 1941) (rejecting the rule because it "was the

The doctrine arose from *Kill v. Hollister*, in which the King's Bench held an arbitration agreement unenforceable because "the parties cannot oust this court."¹⁵³ This declaration grew to represent a general rule precluding courts from enforcing various contract provisions that limited redress in the courts of law.¹⁵⁴ This ouster reasoning, therefore, initially supported common law courts' refusal to enforce anti-suit covenants, pre-dispute waivers of liability, and forum selection clauses.¹⁵⁵ The prevailing judicial attitude was that only courts of law possessed jurisdiction and power to resolve legal disputes.¹⁵⁶ Courts reasoned that only they possessed the ability to "protect rights and to redress wrongs" because private tribunals were prone to "become the instrument of injustice, or to deprive parties of rights which they are otherwise fairly entitled to have protected."¹⁵⁷

Like the revocability doctrine, the ouster theory appeared to be a pretext for judicial hostility to private dispute resolution proceedings that threatened courts' power.¹⁵⁸ This seemed particularly apparent

product of judicial jealousy rather than judicial reasoning"). *But see* *State v. Nebraska Ass'n of Pub. Employees*, 477 N.W.2d 577, 581-83 (Neb. 1991) (refusing specific enforcement of executory arbitration agreements because they oust courts of their jurisdiction and thus defy public policy).

153. *Kill*, 95 Eng. Rep. at 532.

154. *See* *Tobey v. County of Bristol*, 23 F. Cas. 1313, 1320-23 (C.C.D. Mass. 1845) (providing Justice Story's often cited explanation and application of the ouster doctrine in American law); *see also* *Meacham v. Jamestown Franklin & Clearfield R.R. Co.*, 105 N.E. 653, 655 (1914) (refusing to apply Pennsylvania's law enforcing arbitration agreements even though the arbitration contract was to be performed in that state and instead declaring the contract invalid as "contrary to a declared policy of [New York] courts" that would not heed to considerations of judicial comity).

155. *See* *Mut. Reserve Fund Life Ass'n v. Cleveland Woolen Mills*, 82 F. 508, 510 (6th Cir. 1897) (declaring that a contract stipulation that suit may only be brought in federal court was void because it "intended to oust the jurisdiction of all state courts"); *Knorr v. Bates et al.*, 35 N.Y.S. 1060, 1062 (N.Y. Gen. Term. 1895) (holding that a contractual limitation on the right to sue underwriters on an insurance policy was unenforceable because "a provision in a contract that the party breaking it shall not be answerable in an action is a stipulation for ousting the courts of jurisdiction, and as such, is void, upon grounds of public policy"); *Meacham*, 105 N.E. at 656 (Cardozo, J. concurring) (emphasizing that an arbitration contract is an invalid attempt to oust the jurisdiction of the courts because its purpose is the same as agreements requiring litigants to submit their case to a foreign court, but noting that there may be exceptional circumstances warranting enforcement of such forum selection clauses).

156. *See* *Meacham*, 105 N.E. at 656. *See also* *Tobey*, 23 F. Cas. at 1320-21 (denouncing criticisms that the ouster doctrine was based on judicial hostility to arbitration, but then focusing its analysis on fears regarding the skill and judgment of arbitrators to fairly and correctly decide disputes).

157. *Tobey*, 23 F. Cas. at 1320-21. *See also* *Mitchell v. Harris*, 2 Vessey 129, 133, 30 Eng. Rep. 557, 559 ("Arbitrators cannot do justice; for they cannot make the parties produce the evidence.").

158. *See* Chamberlain, *supra* note 144, at 523 (attributing ouster to "hostility of English-speaking courts to arbitration contracts") (quoting Judge Hough's remarks);

as courts refused to enforce arbitration agreements, although they would enforce settlement agreements and final arbitration awards.¹⁵⁹

Indeed, the ouster and revocability doctrines are remnants from ancient dicta that are contrary to both Supreme Court and legislative pronouncements.¹⁶⁰ They defy contract and equity principles.¹⁶¹ Nonetheless, these doctrines have continued to hinder courts' development and application of common contract remedy principles to ADR agreements.

3. *Limited Enforcement and Narrow Perceptions of Private Resolution Processes*

Some nineteenth century courts nominally analyzed arbitration agreements under equitable contract principles. Even these courts,

COHEN, *supra* note 131, at 165-69 (discussing criticisms of ouster and revocability doctrines); Glenda Burke Slaymaker, *The Legality of Contracts Affecting the Jurisdiction of Courts*, 58 CENT. 64, 64 (1904) (attributing the ouster doctrine to the "jealousy of the courts in preserving the integrity of their jurisdiction" combined with the public interest in "permitting every citizen to resort to the courts to obtain the protection of the law to which he is entitled"). *Cf.*, Sayre, *supra* note 137, at 610-12. Sayre questioned the perceived judicial jealousy and proposed that courts merely were protecting common law rights by refusing to enforce arbitration agreements where they were not assured due notice and fair hearing in arbitration. *Id.*

159. See Slaymaker, *supra* note 158, at 64-66. In the early common law, courts refused to enforce various contracts as against public policy due to their perceived infringement on courts' jurisdiction, including arbitration agreements, anti-suit covenants, and forum selection clauses. *Id.* See also *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 121 (1924) (recognizing the confused state of the law before the enactment of the FAA: "If executory, a breach will support an action for damages. If executed—that is, if the award has been made—effect will be given to the award in any appropriate proceeding at law, or in equity.") (citations omitted).

160. *Sturges & Reckson*, *supra* note 21, at 842. Even in 1962, before the Supreme Court's "pro-arbitration" pronouncements in *Prima Paint* and *Southland*, prominent arbitration scholars noted Supreme Court cases such as *Burchell v. Marsh*, 58 U.S. (17 How.) 344, 349 (1854), in which the Court seemed to admonish courts' refusal to enforce arbitration agreements. *Id.* at 840, 823-25, 831-43 (emphasizing lack of basis for common law refusal to specifically enforce agreements to arbitrate).

161. See 3 RESTATEMENT (SECOND) OF CONTRACTS §§ 359-65 (stating requirements for ordering specific performance or injunctive relief); see also, e.g., *Valdez Fisheries Dev. Ass'n, Inc. v. Alyeska Pipeline Serv. Co.*, 45 P.3d 657, 667 (Alaska 2002) (dismissing a claim for breach of an agreement to negotiate where the alleged agreement was based on a vague exchange of letters that did not provide any standards or methods for resolving differences); see also RANDY E. BARNETT, PERSPECTIVES ON CONTRACT LAW 59-89 (2d ed. 2001) (discussing ongoing debate regarding proper application of specific performance relief).

however, generally refused to order parties' compliance with contracts to participate in arbitration or other private ADR processes.¹⁶² They assumed that courts lacked power "to fully execute any decree" for specific performance of an arbitration agreement.¹⁶³ This nominally equitable assumption, however, incorporated *ouster rationale*.¹⁶⁴ For example, some courts would order parties to submit a fair price determination to an appraiser under a sales contract or at least would enforce the contract at a judicially determined price in order to protect the parties from injustice.¹⁶⁵ However, most courts ignored this insistence on preventing injustice when they refused to compel performance of broad agreements to arbitrate that appeared to displace courts' power.¹⁶⁶ In refusing to enforce an arbitration promise, a court would allow a recalcitrant party to "take advantage of his own misconduct."¹⁶⁷

Courts also incorporated *ouster rationale* in their unfavorable perceptions of arbitration. In *Tobey v. County of Bristol*, for example, Justice Story denied that judicial hostility drove the court's refusal to compel the plaintiff to submit his claims to arbitration.¹⁶⁸ Justice

162. Alfred Hayes, *Specific Performance of Contracts for Arbitration or Valuation*, 1 Cornell L.Q. 225, 225 (1916).

163. *Id.* at 225-37 (stating grounds for courts' refusal to specifically enforce arbitration agreements, but also discussing exceptions for enforcement of appraisals while subtly criticizing the *ouster* doctrine as it had skewed specific performance of agreements to arbitrate).

164. In addition, courts of equity may have refused to condone a private procedure's substitution for courts of law because equity courts themselves were barred from exercising jurisdiction over matters entrusted to courts of law. 30A C.J.S. *Equity* § 17 (updated 2002) (stating general rule that a court of equity will only exercise its power where there is no adequate legal remedy).

165. Hayes, *supra* note 162, at 228-34 (indicating that courts of equity would enforce valuation agreements by ordering the parties to proceed with valuation or "ignor[ing] the provision as to mode of valuation, the court itself fixing value" in order to protect the parties from injustice). See also SIR EDWARD FRY, *SPECIFIC PERFORMANCE OF CONTRACTS*, § 359 (2d ed. 1861) (stating that incomplete contracts cannot be specifically enforced, including contracts that leave terms to be supplied in the future — a principal stated for not enforcing agreements that leave terms to be supplied by a private procedure).

166. Sayre, *supra* note 137, at 235-37 (explaining further that some commentators, including Lord Pomeroy, suggested that the rule may be doubted in light of cases in which breaching parties were permitted to benefit from their breach of arbitration agreements); see also *Milnes v. Gery*, 33 Eng. Rep. 574 (Ch. 1807) (refusing to appoint a special master to value real estate or order parties' compliance with their agreed mode for fixing the price, regardless of whether the contract failed "from bad faith on the one side, or the other," and warning that "[p]ersons, entering into such an agreement, must be aware, that by possibility it may never be carried into execution").

167. Sayre, *supra* note 137, at 235-37.

168. *Tobey v. County of Bristol*, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (No. 14,065).

Story framed his analysis in contract remedy terms in finding that the court could not exercise its equitable discretion to order arbitration because "the merits and circumstances of the particular case" made it futile to order arbitration.¹⁶⁹ In reality, this conclusion was based on negative views of arbitration.¹⁷⁰ Justice Story opined that arbitrators had the propensity to become instruments of injustice, to misunderstand the principles of law and equity, and to render judgments that are "but rusticum judicium."¹⁷¹

Although the ouster and revocability doctrines targeted binding arbitration, their effects were far-reaching. They infected enforcement of all private dispute resolution agreements. The doctrines fueled a legal presumption that private procedures were too uncertain or futile to be worthy of judicial compulsion.¹⁷² For example, courts assumed they lacked power to order parties' compliance with agreements requiring appraisal of land because they could not appoint appraisers.¹⁷³ Similarly, these traditional attitudes have continued to hinder enforcement of ADR agreements under contract law.¹⁷⁴

169. *Id.* at 1319-23 ("Courts of equity do not refuse to interfere to compel a party specifically to perform an agreement to refer to arbitration, because they wish to discourage arbitrations, as against public policy. On the contrary, they have and can have no just objection to these domestic forums, and will enforce, and promptly interfere to enforce their awards when fairly and lawfully made, without hesitation or question.").

170. *Sturges & Reckson*, *supra* note 21, at 838-39. *See also Tobey*, 23 F. Cas. at 1321-23.

171. *Tobey*, 23 F. Cas. at 1320-23 (stating specific relief would be improper because parties' compliance involved their good faith, and the court would not have power to force parties' selection of arbitrators, or to supervise and ensure performance of such agreement). *See also Sturges & Reckson*, *supra* note 21, at 837-39 (discussing Story's reasoning in *Tobey* as a "refinement in the paternalism of the courts").

172. *See Dave Greytak Enters. v. Mazda Motors of Am., Inc.*, 622 A.2d 14, 22-24 (Del. Ch. Ct. 1992) (finding parties had no duty to negotiate in good faith pursuant to their contract because any such obligation would only provide "the first step of a more comprehensive procedural scheme" that would stir litigation and "possible contempt decree"); *Pillow v. Pillow's Heirs et al.*, 1842 WL 2018 at *1-2 (Tenn., Dec. 1842) (refusing to specifically enforce an appraisal contract because the court had no power to "make a new contract" by selecting substitute appraisers).

173. *Pillow*, 1842 WL 2018 at *1-2. The opinion's murky facts indicated that the appraisal procedure had been initiated, but that it "proved an entire failure" likely after a party refused to comply. *Id.* *See also Robinson v. Lumbermen's Mut. Cas. Co.*, 168 A. 321, 398-401 (Pa. Super. Ct. 1933) (finding appraisal was not arbitration governed by Pennsylvania's Arbitration Act, and therefore was revocable by either party at any time before an award was made).

174. *See, e.g., Dave Greytak Enters.*, 622 A.2d at 22-24 (declining to order negotiations based on an assumption that the order would be futile).

B. *Modern Courts' Reluctance to Order Compliance With Arbitration and ADR Agreements Based on Traditional Doctrines and Perceptions*

Why rehash old ouster and revocability doctrines? One would assume that courts have erased them from common law in light of current policies encouraging ADR.¹⁷⁵ Some courts seem *over-eager* to compel arbitration and ADR using the FAA and UAA.¹⁷⁶ Other courts, however, cling to anti-enforcement doctrines despite the FAA's pro-enforcement mandate.¹⁷⁷ Courts also incorporate these anti-enforcement principles and attitudes in narrow perceptions of ADR agreements.¹⁷⁸ This bipolar jurisprudence has led some courts to assume they lack power to order participation in contractual ADR processes not governed by statute.¹⁷⁹ Vestiges of ouster rationale also have contributed to some courts' rejection or limitation of the

175. See *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (explaining federal policy endorsing arbitration and private resolution because it generally is considered cheaper, faster, and more flexible than litigation, and it minimizes hostility and is less disruptive of ongoing relations).

176. See *Inland Group of Cos., Inc. v. Providence Washington Ins. Co.*, 985 P.2d 674, 678-80 & n.1 (Idaho 1999) (assuming in a footnote without discussion that the state's UAA applied to an insurance policy requiring appraisal of losses covered by the policy, and therefore determining enforcement and waiver issues under the Act's pro-arbitration law and procedures); *Meineke v. Twin City Fire Ins. Co.*, 892 P.2d 1365, 1369-70 (Ariz. Ct. App. 1995) (applying the state UAA's pro-arbitration "policy" to appraisal in determining whether a party had waived its right to demand appraisal of losses under an insurance policy). See also *supra* Part I (discussing courts' over-application of the FAA and UAA to mediation and other procedures outside the acts' purview).

177. See *In re Am. Ins. Co.*, 203 N.Y.S. 206, 206 (N.Y. App. Div. 1924) (finding an appraisal was not "arbitration" governed by the state's Arbitration Law and therefore reversing an order compelling the parties to submit damage disputes to the appraisal process). See also *Robinson v. Lumbermen's Mut. Cas. Co.*, 168 A. 321, 321-23 (Penn. 1933) (finding that an appraisal clause in a fire insurance policy did not call for "arbitration" governed by the state's newly adopted Arbitration Act because it would not finally determine the parties' entire controversy and therefore holding that the appraisal clause was revocable by either party prior to an award by the appraisers).

178. See ALAN SCOTT RAU ET AL., *ARBITRATION* 58-59 (2d ed. 2002) (explaining continued survival of "common law arbitration" that generally ensures enforcement of an agreement to arbitrate only "as long as consent to arbitrate has not been revoked and the parties have proceeded without objection to an award" (citations omitted)). See also, e.g., *Little v. Allstate Ins. Co.*, 705 A.2d 538, 540 (Va. 1997) (finding that Virginia's adoption of the UAA excluded insurance contracts and thus enforceability of arbitration agreements fell under the common law "which allows revocation of such an agreement at any time up to the publication of an award").

179. See *HIM Portland, LLC v. Devito Builders, Inc.*, 211 F. Supp. 2d 230, 233 n.5 (D. Me. 2002) (finding parties' failure to trigger an arbitration requirement by seeking mediation under the contract precluded application of the FAA, and thus allowing the parties to litigate under the assumption that "the Court cannot order the parties to mediate").

separability principle that precludes courts from considering contract defenses other than those aimed at an agreement to arbitrate.¹⁸⁰ It is time for courts to clear these vestiges from common law in order to equitably enforce ADR agreements in appropriate contexts.¹⁸¹

1. *Modern Application of Ouster and Revocability Rationale*

The Nebraska Supreme Court demonstrated reliance on traditional anti-enforcement of private dispute resolution in the 1991 case, *State v. Nebraska Ass'n of Public Employees*.¹⁸² In that case, the Nebraska Attorney General sought a declaratory judgment that Nebraska's UAA violated the state constitution by requiring specific enforcement of binding arbitration contracts.¹⁸³ Nebraska had waited until 1987, many years after most other states,¹⁸⁴ to enact the UAA.¹⁸⁵ The Nebraska Supreme Court, however, quashed the Act under a Nebraska constitutional requirement that "[a]ll courts shall be open, and every person, for any injury done him . . . shall have a remedy by due course of law, and justice administered without denial or delay."¹⁸⁶ Most states have denied these challenges of arbitration statutes under such "open courts" provisions.¹⁸⁷ Nonetheless, the

180. See Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 852-55 (2003) (citing cases rejecting or narrowing separability due to legacy of confusion regarding the survival of ouster rationale).

181. See *infra* Part IV and accompanying text (proposing refreshed common law enforcement approach).

182. 477 N.W.2d 577 (1991).

183. *Id.* at 577-79. The action named the Nebraska Association of Public Employees, Local 61 of the American Federation of State, County, and Municipal Employees ("NAPE"), and the Nebraska Association of Correctional Employees/American Federation of State, County, and Municipal Employees ("NACE") as defendants, seeking to invalidate clauses in two labor contracts which required the unions, their members, and the employer involved to submit future disputes to binding arbitration. Although the case apparently involved arbitration clauses in labor agreements, the court's analysis was based on the constitutionality of the state's adoption of the UAA, Neb. Rev. Stat. §§ 25-2601 et. seq. (Reissue 1989). *Id.*

184. Nebraska was the 35th state to approve the 1955 UAA. 7 UNIFORM LAWS ANNOTATED (U.L.A.) PART I, *Uniform Arbitration Act*, 1 (1997).

185. Nebraska Ass'n of Pub. Employees, 477 N.W.2d at 580 (citing and quoting Neb. Rev. Stat. §§ 25-2601 et seq. (Reissue 1989)).

186. *Id.* at 580 (quoting Neb. Const. Art. I, § 13). The court's analysis of the UAA's constitutionality was based solely on cases applying ouster doctrine to arbitration in the 1800s and early 1900s. *Id.* at 581-82 (quoting various pronouncements of the ouster doctrine from 1889, 1895, 1901 and 1902, and later citing a few more modern cases as restating the ouster policy). The court provided no interpretative analysis of the constitutional "open courts" requirement upon which it relied.

187. See *Rollings v. Thermodyne Indus., Inc.*, 910 P.2d 1030, 1031-36 (Okla. 1996) (finding Oklahoma constitutional provision requiring that state courts "shall be open to every person, and speedy and certain remedy provided for every wrong and for

Nebraska Court relied on century-old cases applying ouster rationale to conclude that pre-dispute arbitration agreements "oust the courts of jurisdiction and are thus against public policy and therefore void and unenforceable."¹⁸⁸ The court equated Nebraska's "open courts" provision with the ouster doctrine and rejected as "irrelevant" strong contentions that the legislature's adoption of the UAA was a declaration of public policy in favor of arbitration.¹⁸⁹

Is Nebraska's view an anomaly in this "pro-ADR" period? Not entirely. Other courts have restated or refused to overrule the ouster and revocability doctrines, or have otherwise indicated continued hostilities and narrow perceptions of arbitration and ADR.¹⁹⁰ In addition, some states allowed contradictory opinions to fester by failing

every injury . . . and justice shall be administered without sale, denial, delay or prejudice" did not bar enforcement of arbitration agreements and that the majority of states have upheld arbitration statutes under "access to the courts" constitutional provisions); *State Farm v. Broadnax*, 827 P.2d 531, 533-39 (Colo. 1992) (finding that state constitutional "open courts" requirement did not bar binding arbitration under state's No Fault Act requiring parties to agree to binding arbitration of claims arising out of insurance contracts). See also Mark Arthur Saltzman, *Recent Development, Reed v. Farmers Insurance Group*, 15 OHIO ST. J. DISP. RESOL. 895, 900-03 (2000) (noting Illinois Supreme Court's finding that insurance arbitration statute did not violate any federal or state constitutional provisions); John Tutterow, Note, *The Constitution v. Arbitration: Rollings v. Thermodyne and a Proposal for a New Alternative to Arbitration*, 22 OKLA. CITY U. L. REV. 697, 697-700 (1997) (discussing the *Rollings* decision and Oklahoma's validation of arbitration provisions in the face of challenges based on state constitutional "open courts" provisions).

188. *Nebraska Ass'n of Pub. Employees*, 477 N.W.2d at 582.

189. *Id.* at 582. After quickly declaring the unconstitutionality of the UAA, the court rejected an argument that the state's authorization of arbitration clauses in state employment contracts should equitably estop the state from challenging the validity of these arbitration clauses. *Id.* at 582-83.

190. See, e.g., *Garretson v. Mountain W. Farm Bureau Mut. Ins. Co.*, 761 P.2d 1288, 1290 (Mont. 1988) (acknowledging the continued vitality of the ouster rationale in finding an appraisal clause in an insurance contract was not arbitration controlled by the UAA and specifically enforcing the clause because it fit an exception to the ouster rule for appraisals that would not "oust the jurisdiction of the courts, but only require[d] a certain character of evidence of a fact in controversy," citing and quoting *Randall v. Am. Fire Ins. Co.*, 25 P. 953, 956-57 (1891)); *Spinsky v. Kay*, 550 N.E.2d 349, 351 (Ind. Ct. App. 1990) (declaring without question the "well-established" common law rule that a court will not order specific performance of an agreement to submit a controversy to arbitration, but finding the appraisal clause at issue could be specifically enforced because it fit the exception for appraisal of "non-essential" issues such as property value, citing and quoting *Coles v. Peck*, 96 Ind. 333 (1884)); *Huntington Corp. v. Inwood Constr. Co.*, 348 S.W.2d 442, 444 (Tex. Civ. App. 1961) (applying the ouster rationale as Texas "public policy" to refuse specific enforcement of an executory arbitration agreement, while stating that a party may recover damages for breach of the agreement "for the law favors arbitration").

to clarify rejection or acceptance of the ouster doctrine.¹⁹¹ For example, in *Huntington Corp. v. Inwood Constr. Co.*, the Texas Court of Appeals accepted and applied the ouster doctrine.¹⁹² In that case, Inwood moved to compel arbitration of claims arising from a construction contract incorporating an arbitration clause that is common in the construction community.¹⁹³ The court did not question ouster rationale, but instead assumed any attempt to specifically enforce an agreement to arbitrate "amounts to nothing."¹⁹⁴ The court, therefore, licensed the commercial parties' defiance of their arbitration promises.¹⁹⁵ It merely left Inwood free to seek nominal damages for breach of the arbitration contract.¹⁹⁶

After *Huntington*, the Texas Supreme Court created an ambiguity in Texas law by criticizing the ouster doctrine without clearly denouncing it.¹⁹⁷ The Texas Court of Appeals, therefore, struggled to decipher Texas common law in *Wylie Indep. Sch. Dist. v. TMC*

191. Compare *Wylie Indep. Sch. Dist. v. TMC Found., Inc.*, 770 S.W.2d 19, 22-23 (Tex. App. 1989) (finding an arbitration agreement may be specifically enforceable under common law) with *Huntington Corp.*, 348 S.W.2d at 445 (applying the ouster and revocability doctrines to deny specific enforcement of an arbitration agreement). Compare also *Meacham v. Jamestown, Franklin & Clearfield R.R. Co.*, 211 N.Y. 346, 351 (N.Y. 1914) (applying ouster doctrine to refuse specific enforcement of an arbitration agreement) with *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 462-63 (E.D.N.Y. 1985) (specifically enforcing an agreement to submit disputes to non-binding arbitration under the FAA).

192. 348 S.W.2d 442, 444 (Tex. Ct. App. 1961).

193. *Huntington Corp.*, 348 S.W.2d at 444. See also Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO ST. J. ON DISP. RESOL. 303 (1998); Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65, 139 (1996); Thomas J. Stipanowich, *Of "Procedural Arbitrability": The Effect of Noncompliance with Contract Claims Procedures*, 40 S.C. L. REV. 847, 848 (1989) (all discussing arbitration under the standard American Institute of Architects ("AIA") contract provisions and its acceptance in the construction industry).

194. *Huntington Corp.*, 348 S.W.2d at 445.

195. *Huntington Corp.*, 348 S.W.2d 804, 805-06 (Tex. App. 1971) (addressing the case for the third time, after initially reversing an order enforcing the arbitration agreement and remanding for trial). This is the type of arbitration agreement that should be enforced due to the construction communities' creation and acceptance of reasonable arbitration procedures. However, the courts' reactionary reliance on ouster rationale led to years of litigation, and consequent delay and expense.

196. *Huntington Corp.*, 348 S.W.2d at 445 (declaring that the arbitration agreement was "not wholly void as contrary to public policy, for the law favors arbitrations," but failing to explain what damages would have been appropriate).

197. See *L.H. Lacy Co. v. City of Lubbock*, 559 S.W.2d 348, 352 (Tex. 1977) (concluding that it was "unnecessary to alter common law arbitration rules" in that case, but finding that ouster was "not justifiable when the case fits within the common mold," leaving it unclear which cases fit the "common mold").

*Founds., Inc.*¹⁹⁸ In that case, a divided panel of the court of appeals found that an arbitration agreement in a construction contract was not governed by the state's arbitration statute because it did not contain statutory notice. A majority of the court concluded, however, that the agreement was specifically enforceable "under such common law rules as may be relevant."¹⁹⁹ The majority did not discuss or even cite *Huntington*. The dissent protested that the intermediate court "is neither the Supreme Court nor is it the Legislature," and therefore it was not the court's province to ignore ouster doctrine that had "served [the] state and nation from the beginning."²⁰⁰

Similarly, New York courts have produced contradictory opinions regarding their acceptance of the ouster doctrine. New York's highest court has never overruled its application of the doctrine in *Meacham v. Jamestown, Franklin & Clearfield R.R. Co.*, a leading case supporting ouster rationale.²⁰¹ Despite *Meacham's* survival, however, some courts in New York have endorsed state public policy favoring specific enforcement of arbitration and other ADR procedures where they "reflect the informed negotiation and endorsement of [the] parties."²⁰² Furthermore, federal courts in New York have indicated willingness to specifically enforce agreements to submit disputes to ADR under the state's common law.²⁰³ These courts have

198. 770 S.W.2d 19 (Tex. App. 1989) (specifically enforcing an arbitration agreement under the clear language of the contract).

199. *Id.* at 21 (quoting *L.H. Lacy Co.*, 559 S.W.2d at 352).

200. *Id.* at 23 (Howell J., dissenting).

201. 211 N.Y. 346 (N.Y. 1914) (refusing to specifically enforce an agreement to submit disputes to arbitration under the ouster doctrine and exemplifying judicial distrust of private dispute resolution prevalent at the time).

202. *Citibank N.A. v. Bankers Trust Co.*, 633 N.Y.S.2d 314, 314 (N.Y. App. Div. 1995) (citing *Westinghouse Elec. Corp. v. New York City Transit Auth.*, 623 N.E.2d 531, 534 (N.Y. 1993), but seemingly applying the state's UAA instead of common law, to enforce an agreement to submit disputes to a non-binding "ADR agreement").

203. See *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 461 (E.D.N.Y. 1985) (applying the FAA to specifically enforce an agreement to submit disputes to non-binding arbitration but also finding that the same relief would be appropriate under New York common law); *Thompson v. Liquichimica of Am., Inc.*, 481 F. Supp. 365, 366 (S.D.N.Y. 1979) (specifically enforcing an agreement "to use best efforts to reach an agreement" without mentioning that the agreement could "oust" a court's resolution of the parties' dispute by resulting in private settlement), *questioned by*, *Jilley Film Enter., Inc. v. Home Box Office, Inc.*, 593 F. Supp. 515, 520 (S.D.N.Y. 1984). See also *CB Richard Ellis, Inc. v. Am. Envtl. Waste Mgmt.*, No. 98-CV-4183(JG), 1998 WL 903495, at *3-4 (E.D.N.Y. 1998) (applying the FAA instead of common law to specifically enforce an agreement to submit disputes to clearly non-binding mediation); *Peck v. Planet Ins. Co.*, No. 93 Civ. 4961, 1994 WL 381544, at *4 (S.D.N.Y. 1994) (concluding that the parties must "proceed in good faith through the appraisal process" under an insurance contract but failing to specify its application of common or statutory law).

dodged *Meacham*, however, by clinging to the FAA or the state's UAA as providing a basis for specific enforcement.²⁰⁴ Indeed, these courts may have misapplied the acts to non-binding ADR procedures due, in part, to their confusion or frustration with the state's common law. Application of the FAA provides an easy enforcement avenue because the Act preempts state law incorporating ouster or revocability doctrine.²⁰⁵

2. *Narrow Remedy Analysis Premised on Limited Perceptions of Private Dispute Resolution Processes*

Most states have denounced the ouster and revocability doctrines. Furthermore, some states have embraced FAA "pro-arbitration" policy, and even have surpassed federal law in advancing arbitration and ADR.²⁰⁶ Still, some courts seem to discount the breadth of values and functions dispute resolution processes provide.²⁰⁷ These courts base enforceability of an ADR agreement solely on the specificity of the ADR process or on whether the process will end the dispute. Such factors are important in determining application of specific relief, but courts should not cast aside careful consideration of other facts, circumstances, and equities of each particular case.²⁰⁸

204. *AMF, Inc.*, 621 F. Supp. at 456; *CB Richard Ellis, Inc.*, 1998 WL 903495, at *3-4; *Citibank N.A.*, 633 N.Y.S.2d at 315 (all applying the FAA or UAA to non-binding procedures).

205. *Id.* See also *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (emphasizing that the FAA's "purpose was to reverse the longstanding judicial hostility to arbitration agreements that has existed at English common law and had been adopted by American courts"); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (stressing the FAA's national policy that preempts contrary state policy).

206. See *RAU, ARBITRATION*, *supra* note 8, at 59 (noting that in some states, common law has developed beyond the FAA and UAA to further the growth of arbitration and advance "the 'pro-arbitration' policy of the state statute to enforce an arbitration agreement *outside* the statute's substantive scope, and *despite* one party's prior attempt to 'revoke'" (emphasis in original). Some states also have created offices to encourage mediation. See, e.g., *ARK. CODE ANN. § 16-7-101, et seq.* (1995); *HAW. REV. STAT. § 613-1, et seq.* (1989); *Kan. Stat. Ann. § 5-501, et seq.* (1996); *N.J. STAT. ANN. § 52:27E-73* (1994).

207. See, e.g., *Chris Guthrie & James Levin, A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 *OHIO ST. J. DISP. RESOL.* 885, 887-91 (1998) (noting values of arbitration and party satisfaction due to personal participation and control in the process). See also *infra* notes 302-14 and accompanying text (discussing relational and process-orientated enforcement of such procedures).

208. See *infra* Part IV.A. (discussing courts' equitable considerations in determining the applicability of specific performance and proposing a more relational analysis of application of specific performance remedies to dispute resolution contracts).

For example, in *Jilley Film Enterprises, Inc. v. Home Box Office, Inc.*, the United States District Court for the Southern District of New York held unenforceable under New York common law, a fairly specific agreement to negotiate because the agreement did not set forth sufficiently "objective standards" or "a clear set of guidelines" for measuring compliance with the process.²⁰⁹ Jilley claimed that HBO breached its express contract to "negotiate exclusively in good faith with respect to the terms and provisions relating to the distribution, exhibition or other exploitation" of a documentary of the filming of "The Terry Fox Story."²¹⁰ In dismissing Jilley's claim, the court critiqued an earlier case in which the same federal court enforced an agreement "to use best efforts to settle disputes." The court concluded with little analysis that such "good faith" standards do not provide sufficiently "definite, objective criteria or standards" to be enforceable.²¹¹ Although it was appropriate for the court to consider the specificity of the agreement, the court discounted possible equities by automatically dismissing the claim without even considering contextual issues.²¹²

Similarly, some courts undervalue process and relational values of non-binding dispute resolution procedures by refusing to enforce participation in such procedures because they cannot force the parties to settle their dispute.²¹³ It is true that courts should respect

209. 593 F. Supp. 515, 520-21 (S.D.N.Y. 1984) (quoting and discussing *Pinnacle Books, Inc. v. Harlequin Enterprises, Ltd.*, 519 F. Supp. 118, 122 (S.D.N.Y. 1981) and *Mocca Lounge, Inc. v. Misak*, 462 N.Y.S.2d 704, 706 (N.Y. App. Div. 1983)).

210. *Jilley Film Enters., Inc.*, 593 F. Supp. at 516-21 & n.1. The parties executed the negotiation agreement on July 21, 1982, and had ongoing discussions regarding production and licensing for the documentary until January 19, 1983, when an HBO employee called and told Jilley's attorney that there would be no deal. *Id.* at 517-518. Jilley claimed, however, that the parties had reached an oral agreement on January 7, that was embodied in the Production and License Agreement HBO sent to another counsel for Jilley on January 18. *Id.*

211. *Id.* at 520-21 (questioning and seemingly denouncing its earlier decision in *Thompson v. Liquichimica of America, Inc.*).

212. See *infra* notes 329-37 and accompanying text (discussing enforcement of private dispute resolution agreements with consideration of facts and equities). In this case, it does not appear that Jilley was seeking to compel HBO's participation in good faith negotiations, but instead was bringing its claim after negotiations had failed. Nonetheless, the court's narrow remedy analysis could impact future requests for specific relief.

213. See, e.g., *Jilley Film Enters., Inc.*, 593 F. Supp. at 520-21 (finding an agreement to negotiate is not enforceable because it is even more vague than an agreement to agree); *Griffin v. Griffin*, 699 P.2d 407, 409-10 (Colo. 1985) (premising analysis of an agreement requiring parents to negotiate and jointly select their child's school on the assumption "the parties merely 'agreed to agree,'" and "such agreements are unenforceable because the court has no power to force the parties to reach agreement and cannot grant a remedy"); *Coldmatic Refrigeration of Canada, Ltd. v. Hess, Nos.*

parties' "freedom from contract."²¹⁴ However, some courts misperceive ADR as merely a means to end disputes. They assume that contracts contemplating future negotiations are unenforceable "agreements to agree."²¹⁵ This overlooks the relational benefits parties may derive from engaging in negotiations. Courts should appreciate that not all agreements to negotiate are too "open-ended and amorphous" to be specifically enforceable.²¹⁶

The purpose of enforcing an ADR agreement may be to provide "breathing space" or foster discussions, which eventually may or may not produce a mutually acceptable and durable resolution.²¹⁷ Regardless of whether a process leads to settlement, it may aid in providing supervised exchange of information, preserving party satisfaction, calming or improving relations, and opening lines of communication.²¹⁸ Moreover, parties report that they benefit simply

A02A1611, A02A1815, 2002 WL 31085964, at *2-3 (Ga. App. Sept. 19, 2002) (finding no breach or fraud claims could be predicated on agreement to sell stock because it left important terms to be negotiated in the future, and thus "was nothing more than an agreement to agree"); *Dave Greytak Enters., Inc. v. Mazda Motors of Am., Inc.*, 622 A.2d 14, 22-23 (Del. Cg. 1992) (finding contract did not provide for specific performance of a duty to negotiate, and emphasizing that the court will not order such relief because it lacks power to force parties to reach an agreement); *see also* 1 WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 45, at 149-52 (Jaeger 3d ed. 1957) (stating generally agreements to negotiate are not enforceable).

214. *See* BARNETT, *supra* note 161, at 11 (discussing courts' reluctance to enforce preliminary agreements that are contingent on the parties' further negotiations of final terms). *See also* *Dep't of Transp. v. City of Atlanta*, 380 S.E.2d 265, 268 (Ga. 1989) (finding court should not impose contempt penalty on parties if mediation fails because "[t]hat would amount to an order to settle the case which requires power the court does not have"); *Ohio Council 8 v. Ohio Dep't of Mental Retardation & Dev. Disabilities*, 459 N.E.2d 220, 223 (Ohio 1984) (emphasizing that "'mediation' and 'arbitration' are not functionally equivalent" in refusing to enforce mediator's non-binding settlement recommendation).

215. *Id.* *See also* *Coldmatic Refrigeration of Canada, Ltd. v. Hess*, Nos. A02A1611, A02A1815, 2002 WL 31085964, at *2-3 (Ga. App. Sept. 19, 2002).

216. *See* Thompson, *supra* note 21, at 31 (assuming that agreements to mediate or "negotiate-in-good-faith" are generally not specifically enforceable under common law).

217. *See* Stipanowich, *supra* note 2, at 856-57 (discussing reasons for enforcing promises to participate in non-binding processes such as mediation and negotiation). "Breathing space" is sometimes precisely what parties need to regain perspective, and objectively assess their case prior to launching litigation. *See id.* (discussing "breathing space").

218. *See id.* (discussing collateral benefits of non-binding processes); Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483, 483-525 (emphasizing the importance of relational thinking in understanding exchange in our world of complex human interactions); Ian R. Macneil, *Contracts: Adjustment of Long-term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 NW. U. L. REV. 854, 887 (1978) [hereinafter *Contracts*] (discussing dispute resolution in relational contracts as means to retain status quo, create harmony, and

from having the opportunity to control a dispute resolution process and outcome, even if the process does not result in settlement.²¹⁹

That is not to say courts should coerce parties' compliance with all ADR agreements. For example, a court should not aid a party's strategic use of an ADR process to "tax the will or resources of an opponent" or to otherwise intimidate and exhaust an opposing party.²²⁰ Likewise, a court generally should not order participation in a process when participation in the process would cause a party to suffer undue trauma, as likely would be true in Vicky's fictional harassment case proposed in the Introduction.²²¹ In addition, some ADR processes should be enforced through informal means rather than judicial compulsion. This may be true with respect to some processes developed within close-knit communities.²²²

The problem is when courts take a bipolar "all-or-nothing" approach to enforcement of ADR agreements by either ordering participation in ADR under the FAA/UAA, or automatically refusing to order such participation under common law.²²³ In this way, courts fail to give due regard to the parties' contractual promises and intent.²²⁴ They also ignore modern contract and remedy principles,

foster communications, and not to create great change or quickly "fix" relationships); see also *Dep't of Transp. v. City of Atlanta*, 380 S.E.2d 265, 268 (Ga. 1989) (finding it would be proper to refer a case to mediation not for the purpose of forcing settlement, but to help parties delineate issues in controversy and examine their needs or interests).

219. See Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. DISP. RESOL. 831, 836 (1998) (discussing benefits of mediation, and laws encouraging or mandating mediation as a precursor to judicial action).

220. Stipanowich, *supra* note 2, at 856.

221. See p. 1 (providing example of ADR agreement).

222. See Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1745-87 (2001) (discussing the cotton industry's Private Legal System ("PLS") and the industry's enforcement of the PLS through "reputation-based nonlegal sanctions" that foster cooperative behavior).

223. See *Kelley v. Benchmark Homes, Inc.*, 550 N.W.2d 640, 643-45 (Neb. 1996) (stretching the FAA to require enforcement of an agreement to submit disputes to non-binding arbitration under the assumption the agreement would be void under state law).

224. See BARNETT, *supra* note 161, at 112 (describing the traditional refusal to enforce preliminary agreements as "all-or-nothing"). Preliminary agreements are distinguishable from agreements to submit disputes to resolution procedures, but some courts apply the same non-enforcement rules to both without analyzing auxiliary values of ordering parties' participation in a procedure. See *Griffin v. Griffin*, 699 P.2d 407, 409-10 (Colo. 1985) (immediately assuming an agreement requiring parents to negotiate was unenforceable).

and the functions of agreements that incorporate flexibility by leaving issues for later negotiation.²²⁵ This Article proposes that where parties have promised to abide by an ADR agreement, a court should determine enforceability of that agreement under refreshed contract and equity principles that recognize process values and are not tainted by the traditional ouster and revocability doctrines or a presumptive refusal to enforce "agreements to agree."

III. EVOLUTION OF CONTRACT AND REMEDY PRINCIPLES DIRECTING COURTS TO ELIMINATE ANTIQUATED DOCTRINES AND REFRESH COMMON LAW ANALYSIS OF ADR AGREEMENTS

Although courts appropriately may analogize to the FAA and UAA in enforcing ADR agreements, courts should not blindly misapply the acts' statutory remedies and procedures to their enforcement. Such misapplication avoids the development of common law and confuses the enforceability of these agreements. This is especially true when courts assume that ADR agreements not governed by the acts are not specifically enforceable due to survival of anti-enforcement doctrines and narrow perceptions of private ADR. It is time to clarify and refresh the law applicable to ADR agreements. The first step is to reject anti-enforcement doctrines and narrow contract remedy theory. Indeed, traditional ouster and revocability doctrines lack basis, the law and equity courts have been unified, and rigid classical theory has given way to more contextual and relational enforcement of contracts.

A. *Legal Developments Denouncing Ouster and Revocability Doctrines and Attitudes*

1. *Basis for "Revocation" of the Revocability Doctrine*

Since the time of *Vynior's Case*, maturing contract and agency principles have sparked criticisms that the revocability doctrine is "fallacious" and "unsound."²²⁶ Lord Coke's revocability dicta in *Vynior's Case* did not even comport with the court's award for the plaintiff in that case. Accordingly, some have viewed the doctrine as

225. See Charles L. Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U. L. REV. 673, 673-88 (1969) (discussing common law's rigid all-or-nothing approach to obligation enforcement, and proposing an alternative middle ground for enforcement of contracts to bargain that arise where parties' preliminary negotiations lead to mutual commitment to bargain in good faith).

226. Sayre, *supra* note 137, at 599 (also noting that Lord Coke does not use the term "agency" in his opinion, and that agency as a separate branch of law was still developing in the early 1900s).

merely the courts' ploy for refusing to enforce arbitration due to judicial hostility to private dispute resolution.²²⁷ Others have emphasized that the doctrine ignores "the contract feature" of an arbitration agreement.²²⁸ Even traditional courts that refused to specifically enforce arbitration agreements under the revocability doctrine generally declined to declare the agreements illegal. Instead, courts remained willing to enforce these agreements by ordering damages for breach of the arbitration contract.²²⁹

Furthermore, the revocability doctrine defies the agency principles some advanced as the doctrine's justification. Agency principles do not support revocability's assumption that arbitrators are agents of the participating parties who remain free to revoke the arbitrators' powers at any time.²³⁰ Agency has long been a distinct "consensual relationship in which one (the agent) holds in trust for and subject to the control of another (the principal) a power to affect certain legal relations of that other."²³¹ An agent also owes its principal fiduciary duties of disclosure and loyalty and is liable to its principal for any misconduct in performing agency duties.²³²

227. Baum & Pressman, *supra* note 27, at 240 ("The real explanation of these decisions is probably to be found in Lord Campbell's oft-quoted remark that the doctrine originated 'in the contests of the courts of ancient times for extension of jurisdiction — all of them being opposed to anything that would altogether deprive every one of them of jurisdiction.'") (citations omitted).

228. *Id.* (further explaining that courts seemed to realize "the unsatisfactoriness of the reasoning in *Vynior's*" and therefore turned to the ouster theory as support for refusal to enforce arbitration agreements).

229. In 1609 when Lord Coke decided *Vynior's Case*, courts would award damages for breach of the arbitration agreement, or of a supporting bond obligation. *Id.* Accordingly, the revocability doctrine had less impact because an action on the bond would compensate parties injured by breach. The doctrine gained force, however, when bonds became unenforceable under the Statute of Fines and Penalties. *Id.* See also Sayre, *supra* note 137, at 599-603 (discussing same and opining that the doctrine originally seemed rational because actions on bonds provided recoveries "sufficient to insure arbitration").

230. See *supra* notes 142-43 and accompanying text (discussing assertion of agency principles to support revocability).

231. Warren A. Seavey, *The Rationale of Agency*, 29 YALE L.J. 859, 868 (1920).

232. *Id.* at 869-870 ("Unless the power holder is also a fiduciary there is no agency."). See also J. DENNIS HYNES, *PARTNERSHIP AND THE LLC* 101-40 (5th ed. 1998) (discussing duties of an agent to the principal, including fiduciary duties, as well as duties to obey and to indemnify the principal for loss caused by misconduct); J. Dennis Hynes, *Freedom of Contract, Fiduciary Duties, and Partnerships: The Bargain Principle and the Law of Agency*, 54 WASH. & LEE L. REV. 439, 444-45 (1997) (noting law of agency's "elaborate treatment of fiduciary duties based on the trust a principal places in its agency, who acts on the principal's behalf").

In contrast, an arbitrator is not the fiduciary of any one party. Nor is an arbitrator subject to one party's control. Instead, an arbitrator generally must remain neutral and render independent decisions.²³³ Arbitrators are "authorized in their own right to judge the dispute impartially and not as agents of either or both parties thereto."²³⁴ Furthermore, arbitrators generally may invoke arbitral immunity to quickly rebuff parties' lawsuits against them for allegedly deciding unfairly or violating procedural rules.²³⁵

Indeed, agency and contract principles negate the revocability doctrine. Contract and agency principles dictate that an arbitrator's duties remain intact unless *all* parties agree to revoke their arbitration agreement.²³⁶ Still, the revocability doctrine has continued to survive under the guise of public policy or as part of the ouster doctrine.²³⁷

233. See RAU, ARBITRATION, *supra* note 8, at 215-16, 247-58 (discussing arbitrators' duty to render independent judgment, and rules regarding arbitral impartiality); See also Bernard Dobranski, *The Arbitrator as a Fiduciary Under the Employee Retirement Income Security Act of 1974: A Misguided Approach*, 32 AM. U. L. REV. 65, 69-82 (1982) (proposing that arbitrators should not be considered fiduciaries under ERISA, especially because arbitrators enjoy immunity from civil suit, and generally do not owe fiduciary duties to disputants or perform duties of trustees in other cases); Sayre, *supra* note 137, at 599-600 (explaining why agency law did not support Lord Coke's reasoning in *Vynior's Case*, and concluding that it is "unfortunate" that agency is discussed in connection with the revocability doctrine).

234. Sayre, *supra* note 137, at 599. Early common law recognized revocability of powers voluntarily granted, and even allowed one accused of a crime to avoid jury trial unless he or she elected to accept such trial. *Id.* at 600.

235. See RAU, ARBITRATION, *supra* note 8, at 257 (noting common application of arbitral immunity to protect the independence of arbitrators).

236. An otherwise binding contract cannot be abandoned absent breach unless the parties mutually agree to such rescission or abandonment. See 2 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 6:10, at 81-82 (Lord 4th ed. 1991) (stating rule that a contract's binding force cannot be affected by subsequent communications "unless they amount to a mutual agreement to rescind or abandon the contract, a binding modification of the contract, or, of course, a repudiation or other breach of the contract"). See also RESTATEMENT (SECOND) OF CONTRACTS §§ 73 & 89 (1981) (stating the "pre-existing duty rule" requiring consideration for enforcement of any contract modification, and provisos for enforcement of modifications based on changed circumstances, estoppel, or valid novation).

237. See *Bonk v. New Castle County*, Civ. A. No. 5196, 1978 WL 4644, at *3-5 (Del. Ch. 1978) (applying the common law rule that "an agreement to arbitrate is revocable prior to the return of an award" to a labor agreement not governed by Delaware's UAA, although the rule is based on "outmoded" policy flowing from "the courts' abhorrence at having their jurisdiction ousted by private agreement"); *County of Jefferson v. Barton-Douglas Contractors, Inc.*, 282 N.W.2d 155, 157-58 (Iowa 1979) (refusing to enforce arbitration agreement that did not comply with the state's arbitration act in part because the court had "consistently followed the general common-law rule that an executory arbitration agreement is revocable at any time"). See also *supra* pp. 32-

2. Basis for Ousting the Ouster Doctrine

Like the revocability doctrine, the ouster theory also defies contract principles. Even some traditional courts rejected the ouster rationale.²³⁸ For example, Lord Campbell in the 1857 case of *Scott v. Avery* opined that public policy required enforcement of dispute resolution contracts. He questioned the ouster doctrine as a product of “the contests of the courts of ancient times for extension of jurisdiction—all of them being opposed to anything that would altogether deprive every one of them of jurisdiction.”²³⁹ Nonetheless, the *Scott* court avoided the ouster doctrine’s continued vitality by refusing to order arbitration because the clause in question made arbitration an express condition precedent to the court having jurisdiction over the action.²⁴⁰ The court reasoned that “ouster” was not applicable because no action could lie “in any [c]ourt whatsoever” until the arbitrators had determined the underwriters’ liability on the contract.²⁴¹

In an effort to combat such tortured analysis, policymakers enacted the FAA to clearly quash the ouster doctrine. Accordingly, it seems courts that criticized ouster would have employed the Act as license to cleanse the doctrine from all common law. Some courts, however, continued to criticize the ouster doctrine without overruling

36 (discussing modern courts’ application of “ouster” doctrine as basis for refusal to enforce common law arbitration).

238. See *Thompson v. Turney*, 89 S.W. 897, 897 (Ct. App. Mo. 1905) (dismissing litigation to allow arbitration to proceed pursuant to Missouri Supreme Court precedent); *Lowengrub v. Meislin*, 103 A.2d 405, 468-69 (Penn. 1954) (ordering participation in an arbitration pursuant to a partnership contract under common law); *Monogahela Navigation Co. v. Fenlon*, 1842 WL 4821, *5-8 (Pa. Sept. 1842) (holding an engineer’s third party determination of the plaintiff’s compensation may be enforced despite the ouster rule where parties waive this “first principle of natural justice” by agreeing to submit a dispute to arbitration).

239. *Scott v. Avery*, 5 H.L. Cas. 811, 853, 10 Eng. Rep. 1121, 1138 (1856). In the same case, Justice Coleridge also urged that the ouster doctrine should be limited because it “[had] been founded on very narrow grounds, directly contrary to the spirit of later times, which leaves parties at full liberty to refer their disputes at pleasure to public or private tribunals.” *Id.* at 1134.

240. *Id.* at 850-53.

241. *Id.* at 851-53 (final opinion of the court announced by Lord Campbell) (“Here the plea is, that the arbitrators have not decided as to the liability of the underwriters, or the amount to be recovered, and therefore an action will not lie.”). See also *Tscheider v. Biddle*, 24 F. Cas. 253, 255-57 (C.C.E.D. Mo. 1877) (stating there was no reason to deny enforcement of a valuation procedure, especially when denial would “reward the party who fraudulently seeks to evade his obligation,” and therefore staying action to prompt the parties’ participation in the procedure; but nonetheless failing to reject ouster and thus emphasizing that agreements to arbitrate should be specifically enforced only where an action at law for damages cannot restore status quo).

it.²⁴² One court, for example, declared in 1946, "The rule that such agreements oust the courts of jurisdiction has an unworthy genesis, is fallacious in reasoning and has been followed merely because of ancient precedent."²⁴³ That same court, however, declined to overrule ouster as applied to executory arbitration agreements. Instead, the court limited its holding to confirming the enforceability of executed awards, a principle courts embracing ouster also accepted.²⁴⁴

In addition, some courts wrongly justified ouster doctrine under the so-called "jurisdictional" precept that private procedures may not displace courts' jurisdiction over private disputes. This precept was flawed, however, because even courts that accepted the ouster doctrine agreed that appraisal and arbitration agreements were not illegal. Revocation of these contracts constituted breach.²⁴⁵ In addition, 20th Century courts began enforcing forum selection clauses and carving exceptions to the ouster doctrine in recognition of a policy "to discourage litigation and to encourage the settlement of disputes out of court."²⁴⁶ For example, some courts enforced appraisal provisions they interpreted to require a third party determination as a condition precedent to bringing a lawsuit or as only encompassing collateral matters.²⁴⁷ Indeed, some modern courts continue

242. See, e.g., *Rueda v. Union Pac. RR. Co.*, 175 P.2d 778, 790-94 (Or. 1946) (strongly denouncing the rule but nonetheless failing to overrule it).

243. *Id.* at 790 (also noting that other "ousters" such as accord and satisfaction agreements were enforceable).

244. *Id.* at 792 (further qualifying enforcement of executed awards rendered pursuant to agreements that are not "essentially unfair" and comply with general rules concerning impeachment of awards).

245. See *Chamberlain*, *supra* note 144, at 523 (explaining such agreements were not illegal *per se* and therefore, theoretically, one could sue for any nominal damages due to breach). See also *supra* note 229 and accompanying text (discussing acknowledged legality of arbitration agreements under traditional law).

246. *Slaymaker*, *supra* note 158, at 65. By the early twentieth century, some courts began to enforce forum selection limitations and the majority of American courts enforced limitations on the time period in which parties could bring action on a contract, as well as agreements for estate settlements and covenants precluding appeal from a trial judgment. *Id.* at 65-66.

247. *Id.* (explaining such agreements were enforceable because they do not wholly replace the courts' power or so-called "jurisdiction" over the parties' disputes). See also *Tsheidter v. Biddle*, 24 F. Cas. 253, 255-57 (C.C.E.D. Mo. 1877) (staying litigation to require arbitration of valuation for a lease renewal pursuant to the parties' agreement, emphasizing that damages would be an inadequate remedy for breach and the lessor should not benefit from "fraudulently thwart[ing] the appraisal"); *Bauer v. Samson Lodge*, No. 32, 1 N.E. 571, 574-76 (Ind. 1885) (discussing conflicts resulting from some courts holding that parties "may prohibit actions at law altogether" and others holding they "may not materially restrict the right to sue"); *Pacaud v. Waite*, 75 N.E. 779, 781-83 (Ill. 1905) (enforcing Board of Trade members' agreements to

to avoid ouster by ordering appraisals under condition precedent analysis.²⁴⁸

In addition, modern contract law provides for enforcement of agreements that arguably oust a court's determination of disputes. Courts uniformly enforce valid settlement agreements, forum selection clauses, waivers of damages, and limitations of liability although these agreements intrude on courts' authority to decide claims or issues.²⁴⁹ Furthermore, the Supreme Court denounced the ouster doctrine as "hardly more than a vestigial legal fiction" in condoning forum selection clauses on the basis that they merely reflect parties' agreement to have their disputes resolved in a chosen forum.²⁵⁰ The

submit disputes to arbitration as a condition precedent to litigation where enforcement would "relieve the members of the board from the expense and delay of a determination of that question in the courts"); *Del. & Hudson Canal Co. v. Pa. Coal Co.*, 50 N.Y. 250, 266-74 (N.Y. 1872) (finding ouster would not bar specific enforcement of agreements that "merely" required arbitration of value issues as "a condition precedent either in terms or by necessary implication" to litigation).

248. See *Bd. of Educ. of County of Berkeley v. W. Harley Miller, Inc.*, 221 S.E.2d 882, 884-89 (W. Va. 1975) (urging state legislature to revise state's arbitration law to clearly replace state's adoption of the "frankly archaic" ouster doctrine, but nonetheless failing to reverse the common law and instead using the "common-law exception" to specifically enforce an agreement to arbitrate where "it has been made a condition precedent to a right of action") (Justice Neely concurring to lament majority's failure to "clearly abolish[] archaic rules regarding arbitration which are passé and ineffective"); *Lynch v. American Family Mut. Ins. Co.*, 473 N.W.2d 515, 517-19 (Wis. Ct. App. 1991) (finding appraisal was not arbitration enforceable under the FAA or UAA, and therefore reversing the lower court's order to stay litigation pending an appraisal where the contract did not clearly require appraisal as a precondition to litigation).

249. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587-95 (1991) (emphasizing that a forum selection clause is enforceable unless the challenging party satisfies the "heavy burden of proof" required to show that a clause is fundamentally unfair, and quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-15 (1972)); *McDermott, Inc. v. Clyde Iron*, 979 F.2d 1068, 1076 (5th Cir. 1992) (stating that "[c]ontractual provisions waiving negligence and strict liability claims are enforceable under New York law"), *rev'd sub nom*; *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994); *Employers Ins. of Wausau v. Suwannee River Spa Lines, Inc.*, 866 F.2d 752, 776 (5th Cir. 1989) (supporting enforcement of contractual remedy limitations); *Worthy v. McKesson Corp.*, 756 F.2d 1370, 1373 (8th Cir. 1985) (emphasizing that "parties to a voluntary settlement agreement cannot avoid the agreement simply because the agreement ultimately proves to be disadvantageous"); *Rutter v. Arlington Park Jockey Club*, 510 F.2d 1065, 1067-69 (7th Cir. 1975) (enforcing disclaimer of liability for one's own negligence). See also ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1472, 525 (Interim ed. 2002) (stating general rules that courts enforce consensual waivers of negligence liability in non-public service contracts).

250. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-15 (1972) (concluding that a "forum clause should control absent a strong showing that it should be set aside").

Court recognized that the ouster doctrine was the product of "historical judicial resistance to any attempt to reduce the power and business of a particular court" and reflected a "provincial attitude regarding the fairness of other tribunals."²⁵¹

The Supreme Court has applied this reasoning to support enforcement of arbitration and ADR agreements. The Court has emphasized that parties do not forfeit claims by submitting them to a private resolution process.²⁵² Instead, arbitration agreements reflect parties' contracts to have their disputes decided in a non-judicial forum. In addition, parties to such agreements direct *their own private conduct* and not the courts' jurisdiction or authority. In this way, parties agree to contractually constrain their assertion of claims as they similarly do through waiver, release, and limitation of liability agreements.²⁵³ Accordingly, enforceability of such agreements is not a jurisdictional issue. Enforcement instead depends on an agreement's validity under contract law.²⁵⁴

Many courts reject the ouster and revocability doctrines because of their flawed bases.²⁵⁵ Indeed, legal logic rejects the assertion that

251. *Id.* at 12.

252. The Supreme Court has emphasized that a forum selection clause is an enforceable agreement to have disputes decided in a chosen forum, even where the clause was not negotiated, but instead was contained in a form contract between a consumer and large company. *Carnival Cruise Lines, Inc.*, 499 U.S. at 587-95 (enforcing a forum selection clause pre-printed on the last page of passengers' tickets for a 7-day cruise). Similarly, the Court held ADEA claims arbitrable in the often uneven bargaining context of employment. *Gilmer v. Interstate/Johnson Lance Corp.*, 500 U.S. 20, 25-26 (1991).

253. *See supra* note 249 (citing cases enforcing such agreements).

254. Agreements waiving claims and damages, as well as settlement and forum-selection contracts, may be unenforceable under contract law. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 & n.14 (1974) (describing an arbitration agreement as "a specialized kind of forum-selection clause" and finding that like such clauses, an arbitration agreement is enforceable unless it otherwise is unenforceable under contract principles such as fraud or coercion); *Bank of Montreal v. Signet Bank*, 193 F.3d 818, 828-29 (4th Cir. 1999) (finding Signet could not rely on a contract provision barring liability based on negligent or reckless conduct where the disclaimer provision itself was induced by fraud and thus voidable under contract law); *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1394-1400 (9th Cir. 1991) (holding settlement agreement unenforceable under public policy insofar as it barred Davies from ever seeking or holding public office). However, courts base their holdings on contract, not jurisdictional, principles. *See id.*

255. *Park Constr. Co. v. Indep. Sch. Dist. No. 32, Carver County*, 296 N.W. 475, 477-91 (Minn. 1941) (expressly rejecting the ouster doctrine as contrary to reason and public policy, despite strenuous dissent); *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96, 103-05 (Miss. 1998) (rejecting the ouster doctrine although "it has been so long settled that the courts are unwilling to disturb it" and expressly overturning "the former line of case law that jealously guarded the court's jurisdiction"); *Wylie Indep. Sch. Dist. v. TMC Found.*, 770 S.W.2d 19, 23 (Tex. App. 1989)

arbitration agreements are inherently revocable or they “oust” the courts of jurisdiction. The ouster and revocability doctrines, therefore, should no longer clutter the common law applicable to enforcement of arbitration and ADR agreements.

B. *Broadened Remedy Analysis Flowing From Consolidation of Law and Equity Courts*

Historically, the divide between courts of “equity” and courts of “law” hindered legal enforcement of arbitration and ADR agreements. Only equity courts generally would order specific performance remedies, such as injunctions and orders compelling conduct other than payment of money.²⁵⁶ For example, Justice Story relied in part on this divide between equity and law in refusing to specifically enforce the arbitration agreement in *Tobey v. County of Bristol*.²⁵⁷ He premised his analysis on a general rule that law courts would not order specific performance of arbitration agreements. He also assumed courts of equity naturally would refuse to use their equitable power to essentially override a law courts’ refusal to enforce such agreements.²⁵⁸ Justice Story further concluded that equity should

(holding that based on policy supporting “ADR,” agreements to arbitrate future disputes are specifically enforceable). See also *Hoboken Mfrs. Co. v. Hoboken R.R. Warehouse & S.S. Connecting Co.*, 27 A.2d 150, 154 (N.J. Ch. 1942) (finding New Jersey had not adopted the ouster doctrine and therefore enforcing the arbitrator’s decision); *Eagle Laundry v. Fireman’s Fund Ins. Co.*, 46 P.3d 1276, 1278 (N.M. Ct. App. 2002) (finding arbitration agreements enforceable under common law, and finding award could be confirmed without a jury trial); *Kaiser Found. Health Plan of the Northwest v. Doe*, 903 P.2d 375, 383 (Or. Ct. App. 1995) (holding that agreements to arbitrate may be specifically enforceable under common law and thus directing that judgment on an oral settlement incorporate the parties’ agreement to arbitrate any remaining issues).

256. Courts of equity developed as separate courts that supplemented courts of law in order to provide remedies and privileges generally not available in the law courts. CORBIN, *supra* note 249, § 1139 at 187 (“The chief reason that induced the court of Chancery to decree the specific performance of a contract was the supposed inadequacy of the available common law remedies to do full and complete justice.”). See also JOHN NORTON POMEROY, *EQUITY JURISPRUDENCE* §§ 1400-01 (4th ed. 1919) (emphasizing that specific performance developed as a “purely equitable” remedy belonging to the exclusive jurisdiction of the equity courts, and that its application must be based on equitable considerations).

257. 23 F. Cas. 1313, 1321 (No. 14065) (C.C. Mass. 1845). See also *Sturges & Reckson*, *supra* note 21, at 836 & n.35 (noting Story’s emphasis on the “subservience” of equity to law, but questioning its accuracy in light of equity’s historic “triumph of equitable principles over technical rules”); *supra* notes 170-71 (discussing Story’s opinion in *Tobey* accepting into American law common law refusal to specifically enforce arbitration agreements).

258. *Tobey*, 23 F. Cas. at 1320-21 (“So that we abundantly see, that the very impracticability of compelling the parties to name arbitrators, or upon their default, for

not support enforcement of arbitration agreements due to the "rule that equity cannot make a decree requiring the performance of personal acts calling for the exercise of skill or discretion."²⁵⁹

Nonetheless, it would have been within an equity court's domain to compel participation in arbitration. Courts of equity had authority to craft "coercive" orders that directed or precluded action, whereas law courts generally declared money obligations and entered judgments.²⁶⁰ Unlike a judge, a chancellor in equity court "actually concerned himself with the evidence of witnesses" and fashioned rules to fit the facts of the case.²⁶¹ Equity courts were free to order whatever remedies they deemed appropriate to enforce equitable rules.²⁶² Furthermore, while a law court would emphasize legal entitlements under preexisting rules, an equity court generally would treat access to its remedies as a privilege ordered in a court's discretion to do "justice apart from law."²⁶³ "[E]quity would not grant a remedy for a legal right unless, without the equitable remedy, the plaintiff would

the court to appoint them, constitutes, and must forever constitute, a complete bar to any attempt on the part of a court of equity to compel the specific performance of any agreement to refer to arbitration.").

259. *Id.* at 1320-22 (emphasizing that even with the parties' "express stipulation, that the submission shall be irrevocable," arbitrators lacked authority because "[t]hey are not ordinarily well enough acquainted with the principles of law or equity" to properly decide disputes). *See also* Sturges & Sturges, *supra* note 102, at 3, n.6 (discussing Justice Story's application of the "doctrine of subservience of 'equity' to 'law,'" and some academics' acceptance of this rationale for equity courts' refusal to specifically enforce agreements to arbitrate). Further explanation of the development of equity courts is beyond the scope of this Article. For a more comprehensive discussion, *see* E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1149-56 (1970).

260. DAN B. DOBBS, *LAW OF REMEDIES* § 2.1(1), at 48-49 (2d ed. 1993). Equity courts ordered a variety of remedies that included not only "coercive remedies," such as injunctions, but also restitutionary and declaratory remedies that more closely resembled relief provided in courts of law. *Id.* at 49. In addition, equitable remedies were distinctive in that they could be enforced by fine or imprisonment for failure to comply, whereas "law courts did not seek to enforce their orders by contempt powers, but by seizure of property." *Id.*

261. *See id.* at 49 (also explaining that the Chancellor tried both facts and law, and therefore there was no jury trial).

262. *Id.* at 50. Equity's jurisdiction was primary with respect to matters such as fraud, mistake, and bankruptcy, because these historically had been created and heard in equity. JAMES M. FISHER, *UNDERSTANDING REMEDIES*, § 21(a), at 148 (2001). In these areas, a party would not have to show the inadequacy of its legal remedy. *Id.* at 149.

263. DOBBS, *supra* note 260, at 50. Equity courts' high degree of discretion was one of its "striking characteristic[s]" that pertained to its remedies, as well as its recognition of defenses based on hardship of the defendant and its power to shape relief to fit particular facts. *Id.* Indeed, equity courts' discretion caused law courts to sometimes view their flexibility "as a kind of lawlessness." *Id.*

suffer irreparable harm.”²⁶⁴ Plaintiffs in equity, therefore, would have to show injury that was “irreparable not in terms of severity but in terms of the injury’s remediability at law.”²⁶⁵ This gave rise to the “irreparable harm” requirement that courts continue to recognize.²⁶⁶

The “legal” remedy of damages generally is inadequate to redress breach of an ADR agreement. Money damages usually will not compensate an injured party for loss of opportunity to discuss disputes, seek resolution, or obtain dispute evaluation through a private process.²⁶⁷ The only real remedy for such breach is often specific performance. Indeed, some traditional common law courts recognized the inadequacy of damages as a remedy for breach of ADR agreements in ordering parties’ to submit isolated issues, such as property value, to contractual appraisal procedures.²⁶⁸ Some early courts also ordered specific performance of contracts for the sale of land even if they left a court to supply a missing price term.²⁶⁹

264. DOBBS, *supra* note 260, at 50. See also FISHER, *supra* note 262, at 149 (explaining equitable enforcement of legal rights as a second category of equity jurisdiction and noting that here there was competition between the parallel systems, akin to that between state and federal courts, and judicial and private dispute resolution processes).

265. FISHER, *supra* note 262, at 149 (“Hence to say the remedy at law is inadequate (or perhaps more accurately “insufficiently adequate”) was to say that the injury was irreparable *at law*.” (emphasis in original)).

266. See DOBBS, *supra* note 260, at 50 (“One of the chief remedial doctrines of equity is called the adequacy test or the irreparable harm rule.”). See also FISHER, *supra* note 262, at 149 (discussing the development and survival of the irreparable injury requirement despite the merger of law and equity systems accomplished in the American colonies during the first half of the twentieth century).

267. See *Joy v. City of St. Louis*, 138 U.S. 1, 46-49 (1891) (finding equitable relief appropriate to enforce a right of way agreement where the remedy at law would be repeated actions for damages and therefore “wholly inadequate”). Interestingly, the Supreme Court cited as support *Tscheider v. Biddle*, 4 Dillon 58, 63 (C.C.E.D. Mo. 1877), which endorsed specific enforcement of executory agreements to arbitrate. *Id.*

268. See *Van Bueren v. Wotherspoon*, 164 N.Y. 368, 377-379 (N.Y. 1900) (finding parties had a duty “to act in good faith to accomplish the appraisement in the manner specified” in the parties’ contract); *Sec. Printing Co. v. Conn. Fire Ins. Co. of Hartford*, 240 S.W. 263, 268 (Mo. Ct. App. 1922) (finding plaintiff was required to comply with an appraisal requirement before bringing action on an insurance policy). See also *Garretson v. Mountain West Farm Bureau Mut. Ins. Co.*, 761 P.2d 1288, 1290-91 (Mont. 1998) (finding common law barring specific enforcement of arbitration provisions did not apply to an appraisal agreement because appraisal “does not oust the jurisdiction of the courts, but only requires a certain character of evidence of a fact in controversy”).

269. *Spinsky v. Kay*, 550 N.E.2d 349, 351 (Ind. Ct. App. 1990) (affirming court’s grant of specific performance of a land lease where price was to be determined by appraisal, but providing that a court, and not appraisers, would ultimately set the price). See also *Coles v. Peck*, No. 11,489, 1884 WL 5361 (Ind. 1884) (finding appellants had properly attempted to have land appraised per their land sale contract, and therefore were entitled to equitable relief).

Other common law courts, however, viewed such pro-active judicial enforcement of private procedures as a threat to judicial business, and the preeminence of law courts. Courts of law and equity that already vied for power in commercial dispute resolution were not eager to enable private competitors.²⁷⁰ Furthermore, courts of law and equity played a game of "hot potato." Law courts would refuse to direct performance of arbitration agreements because ordering such specific relief would violate "the policy of the law," while many equity courts would toss requests for such specific relief because ordering this relief in equity would "believe the equity 'doctrine'" of obedience to law courts.²⁷¹

The divide between courts of law and equity, however, has been abolished and has given way to increased judicial freedom in choosing and applying remedies.²⁷² All courts now have power to order historically "equitable" remedies such as specific performance. Courts also may consider both legal and equitable claims and defenses. Judges may make certain determinations without the aid of a jury.²⁷³ Courts therefore possess the full panoply of tools they need to analyze and enforce contracts in whatever manner is "most effective to do full justice."²⁷⁴ Accordingly, courts are free under modern common law to enforce promises to participate in ADR processes in light of legal and equitable considerations.²⁷⁵ The equity/law divide should

270. See FISHER, *supra* note 262, § 21(a), at 148, n.1 (noting competition between courts of law and courts of equity, and comparing that competition to that "in the relationships between state and federal courts, judicial and administrative decision making, and judicial and private alternative dispute resolution processes"); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983) (Posner, J.) (explaining "the American Arbitration Association is in competition not only with other private arbitration services but with the courts in providing . . . an attractive form of dispute settlement").

271. *Sturges & Reckson*, *supra* note 21, at 841-43 (further noting "a medley of views which are in the earlier decisions in American equity courts, not very reliable as a whole" either supporting or ignoring the revocability rule).

272. *Id.* See JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 127, at 838 (4th ed. 2001) ("There are no longer any separate courts of equity. Law courts now sit as courts of equity where the relief sought in a given case is specific performance, an injunction, or other form of equitable relief.").

273. MURRAY, *supra* note 272, at 729 (also noting that a court determining and granting equitable relief without a jury is free to "mold a decision to fit the case precisely, i.e., it need not be concerned with all-or-nothing remedies").

274. CORBIN, *supra* note 249, § 1136, at 175 (also questioning any limitation on equitable remedies to cases where damages would be inadequate in light of the unification of law and equity courts, and courts' duty to grant relief that will best compensate an injured party).

275. Nonetheless, courts continue to adhere to rules reserving specific performance remedies for cases in which damages are inadequate to compensate the injured party. See MURRAY, *supra* note 272, § 127, at 729-80. However, as the Supreme

no longer hinder or complicate courts' specific enforcement of ADR agreements.

C. *Flexible Contract and Remedy Analysis Under Neoclassical and Relational Approaches That Have Eclipsed Classical Contract Law*

As courts' remedial powers expanded, their enforcement of promises also became more flexible. Courts moved away from the traditionally narrow classical contract doctrine reflected in Professor Williston's original Restatement of Contracts. Classical doctrine strictly focuses contract analysis on the time of contract formation.²⁷⁶ In this way, it effectively limits the sources and factors that may be considered in determining meaning and substantive content of transactions.²⁷⁷ In Professor Ian Macneil's terms, classical doctrine embraces a confined "presentation," meaning that it perceives exchange as bound by present events, namely offer and acceptance.²⁷⁸ Classical law fixates "almost exclusively on a single instant in time — the instant of contract formation — rather than on dynamic processes such as the course of negotiation and the evolution, or changing needs, of a contractual relationship."²⁷⁹

Court has acknowledged in ordering specific performance of agreements to arbitrate grievance disputes, damages generally will not adequately compensate a party for breach of an ADR agreement. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 452-56 (1957) (also noting that the Labor Management Relations Act indicated federal policy favoring enforcement of arbitration agreements).

276. Macneil, *Contracts*, *supra* note 218, at 863-64. Classical contract doctrine in American law developed in the nineteenth century, and became the backbone of the 1932 Restatement of Contracts. *Id.* at 855 n.2. Neoclassical contract law emerged as a modified legal regime within the classical structure, and provided the underlying principles for the Restatement (Second) of Contracts and the U.C.C. Art. 2. *Id.* These labels raise varied dimensions and understandings. Therefore, comprehensive discussion of classical, neo-classical and other contract doctrine is beyond the scope of this Article.

277. *Id.* For example, classical doctrine directed courts to interpret contracts based on writings and formal contract communications, and not parties' identity or other circumstances outside of the formal "agreement." *Id.*

278. Ian R. Macneil, *Restatement (Second) of Contracts and Presentation*, 60 V.A.L. REV. 589, 592-93 (1974) (explaining "presentation" as "recognition that the course of the future is bound by present events, and by those events the future has for many purposes been brought effectively into the present," and proposing that traditional contract theory's usefulness is limited because it requires "total presentation of each contract relation at the time of its formation").

279. Melvin A. Eisenberg, *Why There is No Law of Relational Contracts*, 94 Nw. U. L. REV. 805, 807 (2000) (discussing the static, objective, and standardized nature of classical theory along with the theory's perfect-market bargain paradigm, and rational-actor assumptions).

This classical presentation assumes transactions are products of fully informed strangers' economically rational bargaining in a perfect market. It also expects that these bargains involve clear quantities, little complexity, and limited party interaction.²⁸⁰ Classical doctrine, therefore, prescribes strict ground rules for contract enforcement that uniformly apply to all transactions, regardless of a transaction's context or its moral, political, or social effects.²⁸¹ Under these rules, the doctrine prescribes rigid objective standards that preclude enforcement of offers to be accepted by later acts.²⁸² These standards also may bar enforcement of agreements that require parties to negotiate open terms in the future.²⁸³ In this way, classical contract doctrine ignores that economic exchange does not operate in a vacuum, but instead transpires in varied contexts, circumstances, and relations.²⁸⁴ It also discourages the application of equitable, open-ended remedies and the introduction of third parties into contractual relations.²⁸⁵ Therefore, classical doctrine seems inherently hostile to enforcement of ADR agreements.

As complexities of contracting became evident, neoclassical contract principles emerged as a partial escape from the rigidity of classical law. Neoclassical principles soon eclipsed classical doctrine to become "the law of the Uniform Commercial Code, the Restatement (Second) of Contracts, and today."²⁸⁶ Policymakers recognized that

280. Macneil, *supra* note 278, at 589-94. See also Eisenberg, *supra* note 279, at 808 (emphasizing that classical contract law was based on "a paradigm of bargains made between strangers transacting in a perfect market" and a "rational-actor model of psychology"). "Although rational-actor psychology is the foundation of the standard economic model of choice, the empirical evidence shows that this model often diverges from the actual psychology of choice, because it fails to take into account the limits of cognition" — thereby ignoring behavior of real people. *Id.* at 810-11.

281. Eisenberg, *supra* note 279, at 805-11 (noting classical law left "no room for justifying doctrinal propositions on the basis of social propositions"); Jay M. Feinman, *Relational Contract Theory in Context*, 94 Nw. U. L. Rev. 737, 738 (2000) (emphasizing classical method's application of "clear rules of legal doctrine" to all "consensual relations," without "contextualization").

282. Macneil, *supra* note 278, at 592-93 (describing the "objective theory of contracts, reinforced by such doctrines as the parol evidence rule"); Eisenberg, *supra* note 279, at 806-07 (describing classical method as "objective and standardized").

283. See Knapp, *supra* note 225, at 673-77 (discussing common law's rigid all-or-nothing approach to obligation enforcement).

284. Macneil, *supra* note 278, at 595 (emphasizing how real-life exchange "no longer stands alone as in the discrete transaction, but is part of a relational web").

285. *Id.* at 863-64 (discussing long-term contracts).

286. Feinman, *supra* note 281, at 738-39 (also noting that neoclassical law was the product of criticism of the classical law).

classical law's presentation paradigm did not comport with the reality of transactions.²⁸⁷ The surviving neoclassical system, therefore, broadens classical analysis by allowing for contextual contract interpretation, and consideration of applicable trade custom and social values.²⁸⁸ It also eases classical rules by providing standards that allow for more flexibility and permit some gap-filling.²⁸⁹ For example, neoclassical law allows for enforcement of an offer that does not specify price where one performs definite services that have a reasonably ascertainable market value.²⁹⁰

Nonetheless, neoclassical law continues to embrace classical bedrock principles such as offer, acceptance, consideration, and general performance duties.²⁹¹ Neoclassical law also remains reluctant to condone enforcement of offers that leave parties to set a price through future negotiations.²⁹² This law continues the classical focus on enhancement of individuals' present utilities.²⁹³ The neoclassical system, therefore, discourages courts from enforcing agreements that expect cooperation to the possible detriment of individual utilities and self-interests.²⁹⁴ Nonetheless, neoclassical law allows for greater flexibility and "has a tremendous capacity to deal with new theories and developments."²⁹⁵

One theory pushing traditional limits of neoclassical law is relational contract theory.²⁹⁶ Professor Ian Macneil proposed the theory

287. See Macneil, *supra* note 278, at 870-71 (noting that neoclassical system emerged in part to relax "rigorous presentation").

288. Feinman, *supra* note 281, at 739-41.

289. See *id.* (discussing increased flexibility of neoclassical law); Feinman, *supra* note 281, at 739-40 (noting that the neoclassical method is a mix of standards and rules and is a "much softer" doctrine than classical law).

290. Macneil, *supra* note 278, at 871.

291. *Id.* (explaining that neoclassical law does not offer a "wholly different conception of the law," but instead is built on classical principles, such as "the rules of formation, validation, performance, and remedies"). See also Macneil, *supra* note 278, at 870-71 (emphasizing that neoclassical law "may be seen as an effort to escape partially from such rigorous presentation [of the classical system], but since its overall structure is essentially the same as the classical system, it may be ill-designed to raise and deal with the issues").

292. *Id.* at 871-72 (using examples from Professor Murray's contract treatise).

293. *Id.*

294. *Id.*

295. Macneil, *Contracts*, *supra* note 218, at 873 (acknowledging that neoclassical law eases classical rules and "can go much further than the classical system," but nonetheless emphasizing its limits); see also Feinman, *supra* note 281, at 739-41 (discussing neoclassical doctrine's capacity to accommodate relational contract theory).

296. See Eisenberg, *supra* note 279, at 821 (concluding that relational contract theory has helped to illuminate weaknesses of traditional contract doctrine and bring about awareness of the economics and sociology of contracting, but that it has not created a "law of relational contracts," in that relational contracts, like contracts as a

as an open, inductive, and individualized approach for analyzing and enforcing relations that do not fit classical, and even neoclassical, paradigms.²⁹⁷ His proposal sparked consideration of transactions' "relational webs." These webs include contract durations, complicated personal relations, unclear quantities and qualities, anticipation of future disputes, expectation of cooperative behaviors, and interwoven strings of friendship, reputation, interdependence, morality, and altruistic desires.²⁹⁸ Such factors drive a transaction in accordance with its placement on a spectrum ranging from "highly transactional horse selling epitome" to a "highly relational nuclear family or commune."²⁹⁹

Using this model, Macneil proposed that the presentation of traditional contract doctrines becomes less useful, or applicable, the more relational a contract is on this spectrum.³⁰⁰ For example, long-term contracts and other transactions that involve dynamic relationships are highly relational. They therefore should be analyzed with less emphasis on presentation (time and place of contracting) and more awareness of evolving party needs.³⁰¹ Such contracts should be enforced with an eye toward continuing relations among the parties, even in the face of conflict.³⁰² Accordingly, arbitration and ADR agreements often are especially appropriate in relational contracts because these processes may promote continued cooperation, or, at

class, "must be governed by the general principles of contract law, whatever those should be"); Feinman, *supra* note 281, at 746-48 (proposing that instead of providing a "more general theory of contract," relational method can be used in fragmented, independent contexts, and "can have real influence as a counterweight to the still-powerful discrete, maximizing tendencies of neoclassical contract law"). See also Richard E. Speidel, *supra* note 26, at 823-46 (discussing characteristics, importance, and challenges of relational contracts).

297. Macneil, *supra* note 278, at 589-610 (also noting Professor Macneil's commentary was presented as part of a panel discussing the Restatement (Second) of Contracts during its drafting stage); Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974) (explaining this relational understanding of economic exchange); see also Eisenberg, *supra* note 279, at 812-14 (discussing relational contract theory as "fathered by Ian Macneil," and contrasting relational theory with classical contract law).

298. Macneil, *supra* note 278, at 594-96.

299. *Id.* at 596.

300. *Id.*

301. Macneil, *Contracts*, *supra* note 218, at 873-80 (discussing conflict between the flexibility in approaching relational contracts and neoclassical law's enforcement of terms set at the time of contracting in spite of later changes making those terms undesirable).

302. *Id.* (concluding that parties' planning and the neoclassical system "can provide extensively for the continuance of relations even in the face of serious disputes," but not when "self-interest or other motives of the parties are inadequate to accomplish continuation").

least, allocation of losses in a manner suited to particular relationships.³⁰³

A prime example of such relational transacting is in the cotton industry.³⁰⁴ Professor Lisa Bernstein found in her study of the cotton industry that cotton merchants maximized efficiencies through a private legal system ("PLS") by minimizing transaction, legal system, and collection costs.³⁰⁵ A key feature of this PLS was private tribunals that determined disputes in accordance with industry rules and norms.³⁰⁶ Dispute resolution through these tribunals promoted cooperation, even when one party would not necessarily benefit from participation in a process. This was because parties feared non-legal reputation-based sanctions within the cotton community.³⁰⁷ This was especially true when the parties planned to transact with each other or others within the merchant community in the future. Parties did not want to earn reputations as "deal-breakers."³⁰⁸

Influenced by relational concepts, modern neoclassical contract law has evolved to provide analytical and remedial tools for assisting dispute resolution processes. Indeed, modern contract law is poised to promote ADR processes in relational contracts, such as those involving dynamic or long-term exchanges.³⁰⁹ Modern law recognizes that specific performance often "is the most obvious means" for enforcing an ADR agreement when participation in ADR will serve parties' goals and needs.³¹⁰ Furthermore, the evolution of contract law may provide for increased enforcement of agreements once deemed

303. *Id.* (noting arbitration agreements as an example of parties planning for resolution of future disputes, but acknowledging that arbitration will not necessarily translate into continued relations).

304. Bernstein, *supra* note 222, at 1724.

305. *Id.* at 1724-45.

306. *Id.* at 1745-86. Due to the success of the private tribunals, "[o]ne of the most striking aspects of the cotton industry's PLS is the small number of disputes requiring third-party adjudication." *Id.* at 1762.

307. Bernstein, *supra* note 222, at 1756. Parties often benefit from participation in ADR in many relational contexts, even when they are not eager to participate, because their compliance with the process may earn them the return favor in the future. *Id.*

308. *Id.* at 1756

309. Macneil, *Contracts*, *supra* note 218, at 878-79. Commentators have advocated more contextual and relational analysis of dispute resolution agreements that foster ongoing relations. Katherine R. Guerin, *Clash of the Federal Titans: The Federal Arbitration Act v. The Magnuson-Moss Warranty Act: Will the Consumer Win or Lose?*, 13 LOY. CONSUMER L. REV. 4, 5-6, 16-18 (2001) (proposing that enforceability of arbitration agreements should be analyzed in terms of their benefits within the particular relationship, thereby making enforcement more stringent in ongoing relationships and less stringent in discrete relationships (i.e., consumer contracts)).

310. Macneil, *Contracts*, *supra* note 218, at 879.

too "indefinite," such as agreements to negotiate.³¹¹ Some courts now are willing to enforce sufficiently definite agreements that impose "discernable standards" by requiring the parties to negotiate in good faith.³¹²

This more flexible and contextual analysis should drive courts' application of contract and remedy principles to ADR agreements.³¹³ Such analysis is especially appropriate when parties promise to pursue ADR in the context of a relationship that may continue despite disputes. In dynamic relationships, parties may plan to negotiate or mediate disputes in order to avoid a court's or an arbitrator's application of rules and remedies that may not comport with parties' changing needs.³¹⁴ Accordingly, it is time to clear the way for this contextual and relational enforcement of ADR agreements.

IV. MODERN COMMON LAW TOOLS FOR ENFORCING ADR AGREEMENTS

The FAA and UAA do not apply to non-binding and other ADR processes that do not qualify as arbitration under the acts. In addition, revocability and ouster principles precluding enforcement of arbitration and ADR agreements lack legal basis and, to a large degree, public policy support. Furthermore, courts enjoy liberal remedial powers under our unified judicial system and may exercise those powers in an equitable and flexible manner in light of modern contract law's evolution away from rigid classical rules. Courts therefore have the common law remedial tools they need to enforce ADR agreements in appropriate cases. These tools include specific enforcement remedies, condition and exhaustion principles, and inherent judicial powers to control court dockets.³¹⁵ This Article invites courts to

311. See, e.g., *Howtek, Inc. v. Relisys*, 958 F. Supp. 46, 49 (D.N.H. 1997) (finding agreement to negotiate was sufficiently definite to be enforceable).

312. *Id.* at 48-49 (enforcing agreement to negotiate the manufacture of additional products in good faith).

313. See Macneil, *Contracts*, *supra* note 218, at 876-80, 891-97 (discussing planning for dispute resolution in relational contracts). The relational model calls for dispute resolution planning because the function of classical and neoclassical litigation, and some binding arbitration, is simply to end a dispute. *Id.* at 891. In these cases, the process "is rather like the discrete transaction itself: sharp in (by commencing suit) and sharp out (by judgment for defendant or collection of a money judgment by plaintiff)." *Id.* See also Speidel, *supra* note 26, at 30 (noting that in extended-duration or dynamic contract relations, "the parties might agree in the contract to negotiate in good faith and, if that fails to produce agreement, to submit the problem to mediation or arbitration while continuing to perform").

314. Macneil, *Contracts*, *supra* note 218, at 892-97.

315. See *infra* notes 320-69 and accompanying text (discussing these means for analyzing enforcement of agreements to submit disputes to private resolution).

cleanse common law of ouster and revocability residue and employ these contract and remedy tools in analyzing and enforcing ADR agreements. It also proposes that courts apply these tools with clear appreciation of parties' transaction goals in order to ensure parties' participation in ADR processes when appropriate in light of contextual and relational factors.

A. *Specific Enforcement Remedies*

The tools most appropriate for enforcing agreements to participate in ADR processes often are coercive remedies, such as specific performance and injunctive relief. Specific performance is an appropriate remedy for breach of contract where damages would not adequately compensate the loss, the court will not be overburdened with enforcing its order, and such relief is otherwise appropriate in light of the facts, circumstances, and equities of the particular case.³¹⁶ Stated more simply, courts should apply this remedy when the benefits of ordering specific relief outweigh the detriments that would result from the order. Courts have the power to award any remedy "that seems most effective to do full justice, if it is sought by the injured party."³¹⁷ Accordingly, our unified system of law and equity supports application of coercive or equitable remedies when it is appropriate.³¹⁸ These remedies should not be at the bottom of the judicial toolbox, strictly reserved for rare cases.³¹⁹

Many courts and commentators have begun to embrace this egalitarian view of remedies. Scholars question the so-called "inadequacy of damages" or "irreparable harm" limitations on equitable relief.³²⁰ Nonetheless, a review of modern cases evidences "not infrequent

316. See CORBIN, *supra* note 249, at §§ 1139, 1171 (discussing courts' application of specific performance remedies in light of adequacy of damages and difficulty of enforcement).

317. *Id.* § 1136, at 175 (also questioning any limitation on equitable remedies to cases where damages would be inadequate in light of the unification of law and equity courts, and courts' duty to grant relief that will best compensate an injured party).

318. See David Frisch, *Commercial Common Law, The United Nations Convention On the International Sale of Goods, and the Inertia of Habit*, 74 TUL. L. REV. 495, 541-46 (1999) (discussing the equity/law jurisdictional genesis of limitations on availability of specific relief, but explaining that as early as 1855, British law began liberalizing remedies, and that drafters of UCC Article 2 also hoped to liberalize application of specific relief).

319. CORBIN, *supra* note 249, § 1136, at 175.

320. FISHER, *supra* note 262, at 149; DOBBS, *supra* note 260, at 50-51; Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990) (arguing that the irreparable injury rule should not, and does not, exist in any substantial way).

harsh applications" of these limitations.³²¹ Many courts continue to consider specific performance extraordinary, and limit its application mainly to cases involving real estate or other unique property.³²² Although the merger of law and equity makes the "equitable" label anomalous, the term lives on in the parlance of most courts and practitioners.³²³ Furthermore, it continues to matter whether a claim is labeled "equitable" or "legal" because a plaintiff's claim for a coercive remedy deemed "equitable" (i.e., injunction or order to compel conduct) will be tried without a jury.³²⁴

This traditional reluctance to order specific remedies should not stymie courts' specific enforcement of ADR agreements. Indeed, damages often are inappropriate and inadequate to remedy breach of ADR agreements. Furthermore, it is inappropriate to assume ADR agreements are not specifically enforceable because they are merely futile "agreements to agree."³²⁵ This is why courts have become more

321. Scholars, including James Fisher and Gene Sheve, have questioned Laycock's premise and have recognized that regardless of any exaggeration of the irreparable harm rule, the cases reveal that it is not dead. FISHER, *supra* note 262, at 149-50 (recognizing its continued application); Gene Sheve, *The Premature Burial of the Irreparable Injury Rule*, 70 TEX. L. REV. 1063 (1992) (proposing that the rule survives). See also *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 275 (2d Cir. 1985) (emphasizing that demonstration that "the applicant is likely to suffer irreparable harm" if an injunction is not granted is "the single most important prerequisite for the issuance of a preliminary injunction"). See also Frisch, *supra* note 318, at 544 (noting that despite some commentators' pronouncement of a trend toward expansive application of specific relief under the UCC, "the majority of courts continue to couch their opinions in the traditional orthodoxy of uniqueness or peculiarity").

322. See JOSEPH M. PERILLO, CORBIN ON CONTRACTS §§ 1139-43 (revised ed. 2002) (explaining the genesis of specific performance as an equitable remedy and its limited application to cases in which damages are deemed inadequate); see also *supra* notes 256-75 and accompanying text (discussing distinctions between legal and equitable remedies). But see JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS § 16 (3d ed. 1987) (explaining courts' pro-specific enforcement attitude in ordering remedies for breach of contracts for sale of real property, and sale of unique goods under the UCC); Frisch, *supra* note 318, at 543-46 (proposing that incorporation of the civil law's liberal application of specific relief in The United Nations Convention on the International Sale of Goods ("CISG") will spark expanded availability of specific relief in U.S. courts, thereby breaking "old habits of restraint").

323. See PERILLO, *supra* note 322 (recognizing that the term is "anomalous" and that so-called "equitable" remedies can usually be labeled "coercive," but nonetheless using the "equitable" label in his well known treatise). See also POMEROY, *supra* note 256 (dedicating an entire treatise to "Equity Jurisprudence" in 1919, after the merger of law and equity).

324. See DOBBS, *supra* note 260, at 51 (also noting that the issue is more complicated when a plaintiff seeks both damages and coercive remedies). Whether courts' exercise of discretion is appropriate remains a question for debate. *Id.*

325. See *Jilley Film Enters., Inc. v. Home Box Office, Inc.*, 593 F. Supp. 515, 520 (S.D.N.Y. 1984) (refusing to enforce an agreement to negotiate in good faith as such an agreement is even more vague than an agreement to agree); PERILLO, *supra* note

open to ordering parties to negotiate or mediate in good faith.³²⁶ This is especially true where it appears negotiation or mediation would be fruitful and could possibly produce a settlement or otherwise benefit ongoing or interdependent relations.³²⁷

In addition, courts may become more willing to enforce promises to participate in ADR processes as they expand their appreciation of ADR functions.³²⁸ Even the aging Restatement (Second) of Contracts directs courts to liberally apply equitable remedies.³²⁹ Some have noted a trend toward liberalized application of specific relief since adoption of the Uniform Commercial Code ("UCC").³³⁰ Such increased flexibility in ordering remedies coincides with Llewellyn's and the Restatement drafters' decision to step away from rigid classical contract theory and adopt a more flexible neoclassical approach to contract enforcement.³³¹ Furthermore, the neoclassical system has

322, at §§ 2.8(a)-(b) (stating the general rule that an agreement will be an unenforceable "agreement to agree" where terms are left for further negotiation, and noting courts' application of this rule in refusing to enforce agreements to negotiate). Some courts seem to ignore contractual obligations to mediate, perhaps viewing such agreements as futile because they do not guarantee an end to the parties' dispute. See *Cumberland & York Distribs. v. Coors Brewing Co.*, No. 01-244-P-H, 2002 WL 193323, at *4 (D. Me. 2002) (failing to enforce an agreement to mediate as a condition precedent to binding arbitration). Of course, it is no simple matter to break jurisprudential habits rooted in seventeenth century Anglo-American law that required exceptionality as a strict pre-condition to awarding specific performance. FRIEDRICH KESSLER ET AL., *CONTRACTS: CASES AND MATERIALS* 1069-1108 (3d ed. 1986.)

326. See *Fluor Enters., Inc. v. Solutia Inc.*, 147 F. Supp. 2d 648 (S.D. Tex. 2001) (compelling mediation as prescribed in the parties' contract); *Marshall v. U.S. Home Corp.*, 2002 WL 274457 (Ohio App. 9 Dist. Feb. 27 2002) (staying proceeding to enforce mediation and arbitration provisions).

327. See *supra* notes 217-22, 302-14, and accompanying text (discussing relational enforcement of dispute resolution process).

328. See *PERILLO, supra* note 322, § 2.8(b), at 142-44 (discussing some modern courts' willingness to enforce a contractual duty to negotiate in good faith). See also *id.*, § 1142, at 196-201 (concluding that "the impression plainly left by the sum-total of reported cases is that the remedy of specific enforcement is as available as are other remedies" under our unified system of law and equity). Still, defendants seeking a jury trial may continue to insist on the adequacy of legal remedies. *Id.* at 201.

329. See *id.* See also Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 277 (1979) (proposing that "the compensation goal implies that specific performance should be routinely available").

330. Harold Greenberg, *Specific Performance Under Section 2-716 of the Uniform Commercial Code: "A More Liberal Attitude" in the "Grand Style,"* 17 NEW ENG. L. REV. 321, 344-45 (1982).

331. See *Feinman, supra* note 281, at 738-39 (noting adoption of a more flexible neoclassical approach in the UCC and Restatement (Second) of Contracts). See also *supra* notes 276-314 and accompanying text (discussing progression from classical contract theory).

continued to "evolve in relational directions."³³² This allows courts to expand enforcement of private processes well suited for resolving disputes arising out of long-term, complex or otherwise relational contexts.³³³

Modern contract theory promotes proper application of specific performance. Courts, therefore, should use this remedial tool to enforce ADR agreements when benefits of ordering parties to participate in ADR outweigh detriment caused by coercing party conduct or requiring courts to supervise ADR. In this way, courts may escape bipolar enforcement of ADR agreements that is dependent on whether the FAA or UAA applies.

B. Condition and Exhaustion Principles

If parties agree that they must submit disputes to an ADR process as a condition precedent to seeking judicial relief, then common contract law may allow a court to enforce the agreement under a condition or exhaustion rationale. Under such rationale, a court may stay or dismiss litigation until the parties complete the ADR process.³³⁴ "Condition" analysis generally asks what facts are necessary to invoke a contract duty or to "justify putting court machinery in

332. Macneil, *Relational Contract*, *supra* note 218, at 498 ("The largest single recent body of promise-centered relational work consists of Restatement (Second) of Contracts and the secondary work it has stimulated."); Macneil, *Contracts*, *supra* note 218, at 886 (explaining that the growing significance of ongoing economic relations would continue to push the law in relational directions and perhaps prompt "spin-offs" from classical and neoclassical systems).

333. See Sid L. Moller, *Birth of Contract: Arbitration in the Non-Union Workplace*, 50 S. CAROLINA L. REV. 183, 204-11 (1998) (discussing applicability of relational contract principles in employment contexts, and emphasizing that arbitration and private dispute resolution processes are suited to employment because it is "a highly relational activity that naturally fosters the development of some kind of process for resolving disagreements among its participants"); Katz, *supra* note 19, at 575-77, 584-95 (critiquing objections to enforcement of private dispute resolution procedures and advocating a process-oriented definition that acknowledges benefits of ordering parties' participation in a dispute resolution process). See also Macneil, *Contracts*, *supra* note 218, at 879, 891-901 (discussing suitability of dispute resolution mechanisms to ongoing and dynamic economic relations).

334. See *Kemiron Atlantic, Inc. v. Aguakem Int'l, Inc.*, 290 F.3d 1287, 1291-92 (11th Cir. 2002) (holding mediation was a condition precedent to arbitration under the parties' agreement, and therefore the arbitration provision had not been activated and the FAA did not apply); *Brennan v. King*, 139 F.3d 258, 269-70 (1st Cir. 1998) (holding under Massachusetts contract law that Brennan was required to pursue the grievance dispute procedure before filing suit on his employment claims); *Bill Call Ford, Inc. v. Ford Motor Co.*, 830 F. Supp. 1045, 1053 (N.D. Ohio 1993) (dismissing franchisee's claim for failure to seek mediation of covered disputes as a contractual condition precedent to filing litigation under the franchise agreement).

motion in favor of A against B.”³³⁵ A condition may be any event or performance that must occur before one may bring an action or seek other judicial relief for breach of an agreement.³³⁶ If the condition does not occur as required, then there may be no further action or recourse on the contract until the condition is satisfied or excused.³³⁷

Courts may supply constructive conditions, while parties may create conditions implicitly through their conduct or explicitly by expressly stating conditions in their contracts. An event or performance, therefore, may be a condition to contract rights and duties.³³⁸ Parties may make participation in ADR a condition precedent to filing suit through express contract language or a court may create such a condition “by necessary implication” under the facts and circumstances of the agreement.³³⁹ This type of pre-condition to filing a lawsuit is sometimes viewed as an exhaustion requirement because it is akin to a statutory requirement to exhaust administrative remedies before filing suit. This is exemplified in some employee benefit cases under the Employee Retirement Income Security Act (“ERISA”).³⁴⁰

When parties agree that each must submit disputes to an ADR process as a condition precedent to filing suit in court, they make that process a condition to obtaining judicial recovery.³⁴¹ If the condition

335. ARTHUR LINTON CORBIN, 3A CORBIN ON CONTRACTS § 628 (1960) (discussing conditions precedent to contract performance, breach of duty, or remedial action by a court).

336. See *id.* See also RESTATEMENT (SECOND) OF CONTRACTS § 224 (1981) (“A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.”); 17A AM. JUR. 2D CONTRACTS § 34 (2002) (“a promise, or the making of a promise, may be conditioned on the act or will of a third person”).

337. RESTATEMENT (SECOND) OF CONTRACTS § 225 (1981).

338. *Id.* at § 226 & cmts. No particular language is necessary to create a condition, but some courts look for terms such as “on condition that,” “provided that,” or “if . . . then.” *Id.* at cmt. a. Furthermore, a court may supply a condition by finding it is implied under the circumstances of the parties’ agreement. *Id.* at cmt. c.

339. 4 AM. JUR. 2D ALTERNATIVE DISPUTE RESOL. § 81 (2002). Indeed, arbitration was an enforceable condition on the bond in *Vynior’s Case*, giving rise to recovery on the bond. See *supra* notes 134-50 and accompanying text (discussing the case).

340. See *Watts v. BellSouth Telecomm. Inc.*, No. 02-13230, 2003 WL 23394, at *3 (11th Cir. Jan. 3, 2003) (discussing and applying the court-created administrative exhaustion requirement in ERISA cases, and refusing to apply it in this case because the employer’s benefits plan did not clearly require that a claimant must pursue administrative remedies prior to filing suit in court).

341. See 6 C.J.S. ARBITRATION § 28 (2002) (discussing how arbitration may be made a condition precedent to recovery in an action on a contract); 4 AM. JUR. 2D ALTERNATIVE DISPUTE RESOL. § 81 (2002) (“Where a contract contains a stipulation that the decision of the arbitrators on certain questions shall be a condition precedent to the right of action on the contract itself, such stipulation will be enforced and until

(the process) does not occur, then the conditioned performance (litigation) is excused until the condition occurs or is waived.³⁴² This condition also may be a promise when contracting parties each assume a duty to submit disputes to the ADR process or forego filing suit.³⁴³ Accordingly, a party's failure to comply with the condition not only prevents litigation, but also may constitute breach of the parties' agreement.³⁴⁴ Because damages for such breach generally are nominal and do not adequately remedy the injury suffered (i.e., loss of opportunity to explore settlement, discuss their cases, facilitate amicable relations, etc.), the only adequate remedy for the breach often is to dismiss or stay litigation until the process occurs.³⁴⁵ In these cases, both condition and breach of contract remedy analyses support a court's stay of litigation pending the parties' participation in an ADR process.³⁴⁶

An ADR process that may be enforceable through condition analysis is the Better Business Bureau's ("BBB") "Auto Line" process for resolving "Lemon Law" warranty disputes between automobile manufacturers and consumers.³⁴⁷ The Auto Line program calls for non-binding arbitration, which produces awards consumers may accept or

the method adopted has been pursued, or some sufficient reason given for not pursuing it, no action can be brought on the contract.").

342. RESTATEMENT (SECOND) OF CONTRACTS § 225. A condition must occur unless it is excused. *Id.*

343. See *id.* at § 225(3) (indicating non-occurrence of a condition is also a breach when a party "is under a duty that the condition occur"); § 235 (stating any failure to fully perform according to a contract is a breach).

344. 4 AM. JUR. 2D ALTERNATIVE DISPUTE RESOL. § 111 (2002). Even at common law, failure to comply with an arbitration agreement constituted breach of the agreement, and gave rise to an action for "whatever actual loss" the non-breaching party may prove. *Id.* See also RESTATEMENT (SECOND) OF CONTRACTS § 225 (indicating non-occurrence of a condition may constitute breach of the contract where the condition is also a promise).

345. RESTATEMENT (SECOND) OF CONTRACTS § 225 (1981). See also *Hetrick v. Friedman*, 602 N.W.2d 603, 607-10 (Mich. Ct. App. 1999) (holding arbitration agreement specifically enforceable per Michigan common law).

346. *Hetrick*, 602 N.W.2d at 605-10 (explaining that agreements to arbitrate should be irrevocable under common law of Michigan). See also 4 AM. JUR. 2D ALTERNATIVE DISPUTE RESOL. § 81 (2002) (stating general rule that where participation in ADR is a condition precedent to litigation, "no action can be brought on the contract" until the parties pursue the process, or provide "some sufficient reason" for not pursuing it).

347. BBB, BBB AUTO LINE, (providing information regarding the BBB's program for resolving consumers' Lemon Law warranty disputes against car manufacturers through non-binding arbitration), at <http://www.dr.bbb.org/autoline/index.asp> (last visited Oct. 14, 2003); BBB, CONDITIONALLY BINDING ARBITRATION, (detailing the procedures and rules for BBB's conditionally binding arbitration program), at <http://www.bbb.org/complaints/condbind.asp> (last visited Oct. 14, 2003).

reject.³⁴⁸ Under the program, if a warranty clearly provides that a consumer must submit disputes to the Auto Line process as a condition precedent to recovering on a warranty claim, then a court may apply condition analysis to order parties to participate in the process or refuse to hear any of the parties' claims until after they have completed the process.³⁴⁹ The court in *AMF Inc. v. Brunswick Corp.* relied in part on this analysis in specifically enforcing a duty to comply with a similar BBB advisory opinion process for resolving false advertising claims.³⁵⁰ Nonetheless, the court mistakenly concluded that the non-binding process was arbitration governed by the FAA, perhaps because the court feared survival of ouster doctrine in New York law.³⁵¹

Armed with condition analysis, courts need not cling to the FAA and UAA to enforce ADR agreements regardless of their reluctance to clearly reject the ouster and revocability doctrines. Even courts that accepted these doctrines would use condition analysis to enforce agreements requiring private resolution of "particular controversies

348. BBB, CONDITIONALLY BINDING ARBITRATION, (detailing the procedures and rules for BBB Auto Line's conditionally binding arbitration program), at <http://www.dr.bbb.org/autoline/alrules.asp> (last visited Oct. 14, 2003).

349. See *id.* See also *Verdier v. Porsche Cars North America, Inc.*, 680 N.Y.S.2d 596, 597 (App. Div. 1998) (intimating that plaintiff may have been barred from bringing Lemon Act claim by its failure to submit its dispute to Porsche's dispute resolution mechanism if car sales agreement had clearly stated "that resort to the mechanism is a prerequisite to obtaining relief under the Lemon Law"). But see *Homes of Legend, Inc. v. McCollough*, 776 So. 2d 741, 746-48 (Ala. 2000) (interpreting manufacturer's warranty arbitration provision in accordance with Federal Trade Commission regulations to require non-binding arbitration, and applying FAA § 4 to order parties' participation in the procedure — without even considering contract law remedies).

350. 621 F. Supp. 456 (E.D.N.Y. 1985) (applying arbitration law to BBB's non-binding, advisory arbitration procedures applicable to advertising disputes); *supra* notes 71-78 and accompanying text (further discussing *AMF* decision). See also *Cecala v. Moore*, 982 F. Supp. 609, 612-14 (N.D. Ill. 1997) (holding court had power to stay litigation pending mediation per the contract, but nonetheless holding that Illinois' UAA applied to provide authority for the stay); *Kelley v. Benchmark Homes, Inc.*, 550 N.W.2d 640, 645-46 (Neb. 1996) (holding that FAA applied to require specific enforcement of an agreement to submit disputes to non-binding arbitration). One commentator noted that the court's labeling the non-binding advisory opinion process "arbitration" under the FAA "is farfetched." Steven J. Burton, *Combining Conciliation with Arbitration of International Commercial Disputes*, 18 HASTINGS INT'L & COMP. L. REV. 637, 645 n.13 (1995) (further concluding that the contract argument "is more plausible"). See also *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 349-50 (3d Cir. 1997) (refusing to apply the FAA to the BBB's Auto Line procedure).

351. See *supra* notes 201-05 and accompanying text (discussing New York's failure to clearly reject ouster).

or special questions" when the requirement was stated as a clear condition precedent in the parties' contract.³⁵² Nonetheless, this limitation to discrete issues is not necessary.³⁵³ In addition, courts should not assume an ADR agreement is unenforceable merely because participation in the process is not a clear condition precedent to

352. See 17A C.J.S. CONTRACTS § 242 (2003) ("At common law, and except where the rule is relaxed or where such agreement is authorized by statute, an agreement to submit all disputed questions under a contract to arbitration to the exclusion of the courts is void, although agreements to submit particular controversies or special questions are valid. Provisions that the decision of a specified person as to classification, quantity, or quality of work done or things furnished under a contract, shall be final may be valid."); 4 AM. JUR. 2D ALTERNATIVE DISPUTE RESOL. §§ 110-111 (2003) (stating that despite common law refusal to specifically enforce agreements to arbitrate, courts will require parties to comply with an agreement requiring them to submit "differences as to certain factual matters" as a valid condition precedent to suit); *Hamilton v. Liverpool, London & Globe Ins. Co.*, 136 U.S. 242, 254-56 (1890) (holding insurance policy appraisal provision was valid and specifically enforceable condition precedent to legal action that did not oust the courts' jurisdiction). *But see* *Hamilton v. Home Ins. Co.*, 137 U.S. 370, 385-86 (1890) (holding nearly identical agreement to arbitrate amount of loss under insurance policy did not bar judicial action because it was stated as a "separate and independent provision," and not a clear condition precedent to action). These cases both involved provisions requiring that named appraisers "shall appraise and estimate the loss by fire," but Justice Gray distinguished the two, stating that the Liverpool & London agreement did not specifically bar action until after an appraisal award. *Home Ins. Co.*, 137 U.S. at 385-86. In fact, it is difficult to see this distinction under the facts of the cases, and the opinions seem to highlight the strained analysis caused by ouster and revocability doctrines. See also *Sigal v. Three K's Ltd.*, 456 F.2d 1242, 1243 (3d Cir. 1972) (refusing to enforce parties' contractual attempt to "establish as a condition precedent to the right of any legal action the arbitration of 'all questions in dispute,'" citing the RESTATEMENT (FIRST) OF CONTRACTS §§ 550-51); *Pa. Greyhound Lines, Inc. v. Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees of America*, Div. 1063, 105 F. Supp. 537, 539-40 (W.D. Pa. 1952) (finding under Pennsylvania common law, resort to arbitration as a condition precedent to action is legal but not specifically enforceable in the absence of statute, at least where no arbiter is named in the agreement).

353. Before it finally rejected ouster in 1999, *Hetrick v. Friedman*, 602 N.W.2d 603, 605-10 (Mich. Ct. App. 1999), the Michigan Court of Appeals had based its enforcement of a duty to arbitrate on a condition precedent, or, in the alternative, a construction contract "exception" to revocability. *E.E. Tripp Excavating Contractor, Inc. v. County of Jackson*, 230 N.W.2d 556, 567-71 (Mich. Ct. App. 1975) (criticized in *Hetrick*). See also *Burton*, *supra* note 350, at 644-49 (discussing the unsettled law regarding enforceability of agreements to submit disputes to private processes, namely conciliation); *Sigal*, 456 F.2d at 1243 (refusing to enforce parties' contractual attempt to "establish as a condition precedent to the right of any legal action the arbitration of 'all questions in dispute,'" citing the RESTATEMENT (FIRST) OF CONTRACTS §§ 550-51 (1932)); *Pa. Greyhound Lines, Inc. v. Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees of America*, Div. 1063, 105 F. Supp. 537, 539-40 (W.D. Penn. 1952) (finding under Pennsylvania common law, that resort to arbitration as a condition precedent to action is legal but not specifically enforceable in the absence of statute, at least where no arbiter is named in the agreement).

recovering on a claim in court.³⁵⁴ Still, condition analysis provides courts with additional common law means for staying litigation to enforce ADR agreements.³⁵⁵

C. Courts' Inherent Power to Control Their Dockets

In addition to the power to order participation in an ADR process using specific performance remedies or condition analysis, a court also may stay litigation to foster a related ADR process based on the court's power to "control the disposition of the causes on its docket."³⁵⁶ Federal courts have exercised this power to foster arbitration by staying litigation related to an ongoing arbitration proceeding. This means courts use this power to stay litigation that is not subject to arbitration or the FAA.³⁵⁷ Nonetheless, courts are fairly stingy in exercising this power because it allows a court to stall parties' access to judicial remedies, without the parties' agreement.

354. Even in many administrative exhaustion cases, the key question is whether the statute or the parties' contract clearly states that a party must pursue administrative remedies before filing suit. *See Watts v. BellSouth Telecomm. Inc.*, 316 F.3d 1203, 1208-09 (11th Cir. 2003) (finding the contract could reasonably be interpreted to permit filing a lawsuit without exhausting administrative remedies, and noting that the problem could be rectified through clear drafting).

355. *See Kemiron Atlantic, Inc. v. Aguakem Int'l, Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002) (enforcing mediation as a condition precedent to arbitration under the parties' agreement); *Brennan v. King*, 139 F.3d 258, 269-70 (1st Cir. 1998) (enforcing employment grievance dispute procedure as condition precedent to filing suit on employment claims); *White v. Kampner*, 641 A.2d 1381, 1385-86 (Conn. 1994) (enforcing negotiation as a condition precedent to arbitration); *Lynch v. American Family Mut. Ins. Co.*, 473 N.W.2d 515, 518-19 (Ct. App. Wis. 1991) (enforcing appraisal procedure as a condition precedent to filing suit on an insurance policy). *But see Fluor Enter., Inc. v. Solutia, Inc.*, 147 F. Supp. 2d 648, 650-53 (S.D. Tex. 2001) (finding contract provision precluding suit until 30 days after commencement of mediation allowed plaintiff to file suit while continuing to pursue mediation); *Kelley v. Benchmark Homes, Inc.*, 550 N.W.2d 640, 643-46 (Neb. 1996) (noting binding arbitration agreements are void under Nebraska common law, but holding agreement to submit to non-binding arbitration was enforceable under the FAA); *Fidelity-Phenix Fire Ins. Co. of New York v. Penick*, 401 P.2d 514, 519-20 (Okla. 1965) (holding appraisal was not a condition precedent to suit where insurer in his demand for an appraisal, reserved the right to litigate the question of liability); *Bill Call Ford, Inc. v. Ford Motor Co.*, 830 F. Supp. 1045, 1053 (N.D. Ohio 1993) (holding plaintiffs failed to fulfill a condition precedent to suit by failing to submit warranty repairs disputes to mediation before the Dealer Policy Board); *In re Weekley Homes*, 985 S.W.2d 111, 113-14 (Tex. Ct. App. 1998) (noting that trial court had denied Weekley's motion to arbitrate and ordered the parties to first mediate in accordance with the parties' agreement requiring mediation as "an express condition precedent to the arbitration").

356. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936).

357. *See Nederlandse Erts-Tankersmaatschappij, N.V. v. Isbrandtsen Co.*, 339 F.2d 440, 441 (2d Cir. 1964) (indicating a stay may be appropriate where issues involved are subject to arbitration).

As a precursor to exercising the power, a court first asks "(1) whether there are common issues in the arbitration and the court proceeding, and (2) if so, whether those issues will be finally determined by the arbitration."³⁵⁸ If the answer to both questions is yes, then the movant must show that the party not bound to arbitrate will not hinder the arbitration procedure, that the procedure will be resolved within a reasonable time, and that any delay will not cause undue hardship to the parties.³⁵⁹ Furthermore, a court may grant a stay of litigation even where the movant has not satisfied its burden to show necessity for the stay where it appears arbitration will not be hindered by the non-arbitrating party and no prejudicial delay will result from the stay.³⁶⁰

In *CosmoteK Mumessillik v. Ticaret Ltd. Sirkketi*, for example, a contract between a United States company and its Turkish distributor required binding arbitration.³⁶¹ The manufacturer was not a party to, or otherwise bound by, the distributorship contract containing the arbitration clause.³⁶² Therefore, the distributor's action against the manufacturer was not governed by the FAA, and the manufacturer could not otherwise be compelled to arbitrate claims related to the contract.³⁶³ Nonetheless, the court found that it had inherent power to stay the non-FAA litigation pending arbitration of the claims between parties to the distributorship contract. This was because the arbitration and litigation involved the same product quality issues, the non-arbitrating party (the manufacturer) was not likely to hinder the arbitration, and the distributor was not likely to suffer undue prejudice from delay of its litigation against the manufacturer.³⁶⁴ The court further emphasized that a stay of the non-FAA litigation was appropriate to promote cooperative resolution of the product defect disputes among all the parties.³⁶⁵ The court concluded that the stay would benefit the distributor, despite its opposition to

358. *Am. Shipping Line, Inc. v. Massan Shipping Indus.*, 885 F. Supp. 499, 502 (S.D.N.Y. 1995). See also *Sierra Rutile, Ltd. v. Katz*, 937 F.2d 743, 750 (2d Cir. 1991) (stating same rules).

359. *Am. Shipping Line*, 885 F. Supp. at 502.

360. *CosmoteK Mumessillik v. Ticaret Ltd. Sirkketi v. CosmoteK USA, Inc.*, 942 F. Supp. 757, 761-62 (D. Conn. 1996).

361. *Id.* at 759-60.

362. *Id.* at 759-61.

363. *Id.*

364. *CosmoteK Mumessillik*, 942 F. Supp. at 761. In this case, the manufacturer supported the stay, was represented by the same attorney who represented the company bound by the arbitration agreement, and seemed otherwise willing to pursue a unified resolution of the distributor's claims against the two parties. *Id.*

365. *Id.*

the stay, “[by] putting the two targets in one forum,” thereby reducing their costs and augmenting the resources they could apply to settling claims with the distributor.³⁶⁶

It is unclear how eager courts would be to exercise their inherent power to stay litigation in order to advance ADR outside the scope of the FAA.³⁶⁷ *Cosmoteke Mumessillik*, for example, involved promotion of related arbitration that was governed and compelled under the FAA.³⁶⁸ Nonetheless, these cases indicate that courts may use their inherent power to stay litigation in order to advance ADR. A court would not need to rely on such power when it could compel parties’ participation in an ADR process by ordering specific performance. A court may need this power, however, in order to stay litigation that is not subject to an ADR agreement.³⁶⁹ For example, it may be proper for a court to rely on its inherent power to stay litigation not subject to an ADR agreement where multiple parties with incentive to reach a global settlement had not all previously agreed to participate in one ADR process. In such a case, it may be appropriate for a court to stay litigation that significantly threatens an ongoing ADR process, if the litigating parties will not be unduly prejudiced by delay or any estoppel effects caused by the stay. In this way, a court may use its inherent power to foster process values of ADR.

V. CONCLUSION

Contracting parties have been left without adequate guidance regarding the enforceability of their ADR agreements at a critical time

366. *Id.* The court seemed to question the prudence of the distributor’s opposition to the stay, and advocated “faster resolution” through the arbitration “if counsel are [sic] conscientious.” *Cosmoteke Mumessillik*, 942 F. Supp. at 761. However, the court sought to insure against prejudice to the distributor by requiring periodic updates regarding the arbitration to verify “that the early hearing and decision which are the hallmark of arbitration are in fact afforded to [the distributorship].” *Id.* Furthermore, the distributor remained free to seek to vacate the stay if a risk of prejudice from delay became apparent. *Id.*

367. See *Sierra Rutile, Ltd. v. Katz*, 937 F.2d 743, 750 (2d Cir. 1991) (finding that a court has inherent power not stemming from the FAA, to stay a pending action related to a pending arbitration in which issues involved in the litigation may be determined, but nonetheless declining to grant a stay where the litigated claims would not be affected by the arbitration).

368. *Cosmoteke Mumessillik*, 942 F. Supp. at 759-61.

369. See *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 460-61 (E.D.N.Y. 1985) (finding it had power to order participation in non-binding arbitration under both the FAA and the court’s equitable power). See also *Parisi v. Netlearning, Inc.*, 139 F. Supp. 2d 745, 750 n.10 (E.D. Va. 2001) (stating the *AMF* court relied on its “inherent equitable powers” to stay litigation).

of growth for creative ADR. This has been caused by courts' misapplication of the FAA's and UAA's summary enforcement remedies, and courts' continued adherence to antiquated common law doctrines and narrow perceptions of private dispute resolution processes. Meanwhile, policymakers have not cured this lack of judicial guidance by enacting enforcement rules tailored to these ADR agreements. Instead, they have assumed that common contract and remedy principles provide for such enforcement.³⁷⁰ Accordingly, it is time to clarify and modernize these common law principles in order to foster proper enforcement of ADR agreements.

Contract and remedy law provide courts with the tools to develop a coherent and refreshed approach for determining proper enforcement of these ADR agreements. This approach should allow courts to flexibly and equitably analyze such agreements. Courts may enforce agreements where parties' participation in an ADR process will foster fair settlement or provide other collateral benefits that outweigh burdens of compelled participation in the process. For example, a court may be wise to order corporate parties to negotiate price adjustments under an ADR agreement in a ten-year installment sales contract. It may not be proper, however, for a court to order harassment victims, such as Vicky in the Introduction, to mediate sensitive claims in an intimidating relational environment.³⁷¹ Under this approach, courts may use common law tools to equitably enforce ADR agreements. At the least, courts may use this analytical model to encourage policymakers to craft ADR enforcement rules that account for process values of ADR in varied relational contexts. Indeed, this also may cause legislators to rethink the FAA/UAA automatic compulsion mandate as it applies to arbitration in unequal or emotionally charged relational contexts.

370. See *supra* notes 48-64 and accompanying text (discussing assumptions of UMA and RUAA drafters).

371. Some commentators have recognized that participation in a non-binding dispute resolution process may be beneficial, even when a party resists such participation. See Katz, *supra* note 19, at 580-85 (arguing against the assumption that settlement will not occur merely because one party resists participation in a procedure). But see Klintworth, *supra* note 74, at 193-95 (focusing on external policies and potential problems, and not the parties' relations, in discussing enforceability of agreements to submit to non-arbitral procedures); Burton, *supra* note 350, at 644-52 (focusing on presumptions against compelled cooperation and parties' intentions "to attach legal consequences" to conciliation agreements in proposing that agreements to conciliate generally should not be specifically enforceable).